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**REPORTS**  
**OF**  
**CASES AT LAW AND IN EQUITY**  
**DETERMINED BY THE**  
**SUPREME COURT**  
**OF THE**  
**STATE OF IOWA**

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**SEPTEMBER, 1912, AND JANUARY AND  
MAY TERMS, 1913**

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**BY**  
**W. W. CORNWALL**  
**REPORTER**

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**VOLUME XL**  
**BEING VOLUME CLVII OF THE SERIES**

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**CHICAGO, ILLINOIS:**  
**T. H. FLOOD & CO., PUBLISHERS,**  
**1914**

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JAN 5 1915

## JUDGES OF THE SUPREME COURT.

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\*† EMLIN McCLAIN, *Chief Justice*, Johnson County.  
SILAS M. WEAVER, Hardin County.  
·SCOTT M. LADD, O'Brien County.  
HORACE E. DEEMER, Montgomery County.  
WILLIAM D. EVANS, Franklin County.  
† JOHN C. SHERWIN, Cerro Gordo County.  
FRANK R. GAYNOR, Plymouth County.  
BYRON W. PRESTON, Mahaska County.  
‡ WINFIELD S. WITHROW, Henry County.

---

## OFFICERS OF THE COURT.

GEORGE COSSON, *Attorney General*, Audubon County.  
B. W. GARRETT, *Clerk*, Decatur County.  
W. W. CORNWALL, *Reporter*, Clay County.

\* Justice McClain was Chief Justice until January 1, 1913. Succeeded by Justice Weaver, who became Chief Justice in rotation.

† The terms of Justices McClain and Sherwin expired January 1, 1913, and they were succeeded by Justices Gaynor and Preston.

‡ Justice Withrow was appointed by the Governor pursuant to an Act of the Legislature, April 19, 1913.

# JUDGES OF THE COURTS.

FROM WHICH APPEALS MAY BE TAKEN TO THE SUPREME COURT.

## DISTRICT COURTS.

- First District*—WILLIAM S. HAMILTON, Ft. Madison; HENRY BANK, JR., Keokuk.
- Second District*—D. M. ANDERSON, Albia; F. W. EICHELBERGER, Bloomfield; F. M. HUNTER, Ottumwa; C. W. VERMILION, Centerville.
- Third District*—THOMAS L. MAXWELL, Creston; HIRAM K. EVANS, Corydon.
- Fourth District*—DAVID MOULD, Sioux City; F. R. GAYNOR, Le Mars; J. F. OLIVER, Onawa; WILLIAM HUTCHINSON, Alton.
- Fifth District*—LORIN N. HAYS, Knoxville; J. H. APPLGATE, Guthrie Center; WILLIAM H. FAHEY, Perry.
- Sixth District*—K. E. WILLCOCKSON, Sigourney; BYRON W. PRESTON, Oskaloosa; JOHN F. TALBOTT, Brooklyn.
- Seventh District*—ARTHUR P. BARKER, Clinton; A. J. HOUSE, Maquoketa; L. J. HORAN, Muscatine; WILLIAM THEOPHILUS, Davenport; F. D. LETTS, Davenport.
- Eighth District*—RALPH P. HOWELL, Iowa City.
- Ninth District*—LAWRENCE DE GRAFF, Des Moines; HUGH BRENNAN, Des Moines; W. H. MCHENRY, Des Moines; CHARLES S. BRADSHAW, Des Moines, and JAMES P. HEWITT, Des Moines.
- Tenth District*—CHAS. E. RANSIER, Independence; FRANKLIN C. PLATT, Waterloo.
- Eleventh District*—R. M. WRIGHT, Ft. Dodge; C. E. ALBROOK, Eldora; C. G. LEE, Ames.
- Twelfth District*—J. F. CLYDE, Osage; C. H. KELLEY, Forest City; J. J. CLARK, Mason City.
- Thirteenth District*—L. E. FELLOWS, Lansing; A. N. HOBSON, West Union.
- Fourteenth District*—D. F. COYLE, Humboldt; A. D. BAILIE, Storm Lake.
- Fifteenth District*—A. B. THORNELL, Sidney; EUGENE B. WOODRUFF, Glenwood; ORVILLE D. WHEELER, Council Bluffs; W. R. GREEN, Audubon.
- Sixteenth District*—F. M. POWERS, Carroll; M. E. HUTCHINSON, Lake City.
- Seventeenth District*—C. B. BRADSHAW, Toledo; CLARENCE NICHOLS, Vinton.
- Eighteenth District*—W. N. TREICHLER, Tipton; F. O. ELLISON, Anamosa; MILO P. SMITH, Cedar Rapids.
- Nineteenth District*—ROBERT BONSON, Dubuque; JOHN W. KINTZINGER, Dubuque.
- Twentieth District*—JAMES D. SMYTH, Burlington; W. S. WITHROW, Mt. Pleasant.

## SUPERIOR COURTS.

- Cedar Rapids*—CHARLES B. ROBBINS.
- Council Bluffs*—S. B. SNYDER.
- Grinnell*—J. P. LYMAN.
- Keokuk*—W. L. MCNAMARA.
- Oelwein*—EUGENE J. O'CONNOR.
- Perry*—JOHN SHORTLEY.
- Shenandoah*—GEO. H. CASTLE.

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REPORTS  
OF  
CASES AT LAW AND IN EQUITY  
DETERMINED BY THE  
SUPREME COURT  
OF THE  
STATE OF IOWA

AT  
DES MOINES, SEPTEMBER, 1912, AND JANUARY  
AND MAY TERMS, 1913.

AND IN THE SIXTY-SIXTH YEAR OF THE STATE.

---

JOHN ASHLEY, Administrator of the Estate of JAMES  
ASHLEY, deceased, Appellee, v. IKE KEENAN, Appel-  
lant.

**Chattel mortgages:** DESCRIPTION: SUFFICIENCY. The description  
1 and location of property in a chattel mortgage must be sufficiently  
specific to enable a person not a party to the instrument to  
identify the same, in order that the record may constitute notice  
to a purchaser from the mortgagor. In the instant case the  
description being of "all" the property owned by the mortgagor  
of such description, and as being in the possession of the mort-  
gagor at his "premises in Monona County, Ia.," is held sufficient.

**Same:** PAYMENT: EVIDENCE. In this action by the holder of a  
2 chattel mortgage to recover part of the mortgaged property from  
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a purchaser from the mortgagor, the evidence is held sufficient to support a finding that the mortgage had not been paid.

**Same:** RECOVERY OF PROPERTY BY MORTGAGEE: ESTOPPEL. The fact that  
3 a chattel mortgagor retained possession of the property, managed, used and controlled it in the usual way, that sales were made from the same and applied on the mortgage debt and that numerous payments were made covering a series of years, did not estop the mortgagee from recovering certain of the property sold by the mortgagor to a third party.

**Same:** EVIDENCE. In an action by a chattel mortgagee to recover  
4 possession of mortgaged property, a conversation of the mortgagor with a relative of the mortgagee, who had no interest in or control over the mortgage, in which the mortgagor stated that he intended to apply the proceeds of certain cattle he was about to sell upon the mortgage debt, was immaterial and properly excluded.

*Appeal from Monona District Court.*—HON. DAVID MOULD,  
Judge.

TUESDAY, OCTOBER 22, 1912.

THIS is an action of replevin. The property in controversy is a team of horses and wagon. The plaintiff claims the possession thereof by virtue of a chattel mortgage executed by one F. E. MacNutt on January 10, 1907. The defendant claims the property under an alleged purchase of the same from said F. E. MacNutt subsequent to the execution of the mortgage. At the close of the evidence, the trial court directed a verdict for the plaintiff. Defendant appeals.—*Affirmed.*

*J. A. Prichard and Miles W. Newby, for appellant.*

*C. E. Cooper, and J. W. Anderson, and T. R. Ashley, for appellee.*

EVANS, J.—Plaintiff's mortgage was duly recorded. The defendant contends that the description of the property

contained in the mortgage was so indefinite that the recording thereof imparted no constructive notice. He contends, also, that he was a good faith purchaser for value without notice. He further contends that the mortgage debt was paid, and mortgage thereby satisfied. He also pleads an estoppel, and contends that the plaintiff is estopped by his conduct from claiming the property.

I. The mortgage was given to secure a promissory note for \$1,964.88. The description of property contained in said mortgage is as follows: "The following goods and

1. CHATTEL  
MORTGAGES:  
description:  
sufficiency.

chattels, to wit: 12 head of horses, mares and colts of different colors, all the horses, mares and colts I own, average value of \$100 each; two wagons new and complete, Lansing, 3 and  $\frac{1}{4}$  inches, one single seat top buggy, 3 sets of double work harness, one light, two heavy harness, one Deering corn binder, three milk cows, all red and branded 'F' on right hip, 11 calves 1 year old, spring of 1907, to be branded 'F' on right hip, three sucking calves, 16 brood sows, 500 cords of wood on what is known as Holman's Island. MacNutt further agrees to give as further security to the note secured hereby a chattel mortgage on 200 acres of small grain in spring of 1907. The above-described property is now in my possession and owned by me free from all incumbrance in all respects. To have and to hold the same forever." The mortgage further provided the mortgagor should not remove any part of the mortgaged property "from the said county of Monona." It also provided that, in case of sale of the property under the mortgage, "said sale to take place at the premises in the county of Monona and state of Iowa."

Appellant's principal argument is that the mortgage does not locate the property in any sense, and that its identification, therefore, is impossible under the terms of the mortgage. In *Rhutasel v. Stephens*, 68 Iowa, 627, it was held that the following was not a sufficient description

"one span of colts, three years old, one gray and one bay." In the same case it was held that "all my stock of hogs" was a sufficient description to enable a person not a party to the instrument to identify the property. In the mortgage before us the property is described as being "all" the property owned by the mortgagor of such description, and as being in the possession of the mortgagor at his "premises in Monona County, Iowa." The method of description is almost identical with that shown in *Wells v. Wilcox*, 68 Iowa, 709. See, also, *Wheeler v. Becker*, 68 Iowa, 724; *Brock v. Barr*, 70 Iowa, 400. Following these cases, the description in plaintiff's mortgage must be held good. Our conclusion at this point renders it unnecessary that we consider the question whether defendant was an innocent purchaser for value. The record of the mortgage imparted constructive notice which was as effective against the defendant as actual notice.

The defendant pleaded payment. He contends that there was sufficient evidence of payment to go to the jury. The defendant made certain admissions in his pleadings, and also upon the trial, and thereby took the burden of proof. He called the plaintiff "administrator" as a witness, and examined him on the subject of payment. The note was produced by this witness showing all payments thereon. According to the testimony of this witness, more than \$900 remained unpaid upon the note at the time of the beginning of this action. The present plaintiff is the son and administrator of the original plaintiff, and had personal knowledge of the business in relation to such note. This testimony is in no manner contradicted or discredited. The only evidence pointed out by appellant as tending to prove payment is the fact that the original mortgage was not produced upon the trial, although the original note was. The plaintiff testified that he had been unable to find the original mortgage and a certified copy was used in evidence

2. SAME:  
payment:  
evidence.



in lieu thereof. There was no evidence that it had ever been surrendered to the mortgagor, or that it had been in his possession since it was executed.

III. It is next urged that the plaintiff was estopped by his conduct from claiming the property under his mortgage. The defendant purchased the property in 1909.

3. SAME: re-  
covery of  
property by  
mortgagee:  
estoppel. This suit was not begun until May, 1911, over four years after the date of the mortgage. Many partial payments had been made upon the note covering the entire period. The mortgagor was in possession of the property, and managed, used, and controlled it in the usual way. Some sales had been made, and the proceeds thereof applied upon the note. The circumstances of the making of these sales do not appear. The substance of the contention of appellant is that he was misled by the apparent ownership and control of the property by MacNutt. Authorities are cited to us from other states that such use and control of the property by the mortgagor is inconsistent with the mortgage, and tends to its defeat against innocent purchasers. Such a view is not in accord with the spirit of our statutes, nor with the holdings of this court. One of the purposes of the recording statute in such a case is to permit the mortgagee to hold the constructive possession of the property and the right of actual possession as security for the debt, and yet permit the mortgagor as holder of the title to the property to continue in the actual possession of the property and in the care and use thereof until the enforcement of the mortgage be had. This is a humane method of business, and operates to the great advantage of the mortgagor, and without detriment to any other person. The record was as available to the defendant as any other form of notice. There is no evidence of any act of any kind on the part of the mortgagee which tended in any way to waive his mortgage, except his long sufferance and delay in enforcing the same.

IV. The defendant offered to prove a conversation between the mortgagor and one Thomas Ashley. It was made to appear that there was an occasion when the mortgagor had sold some cattle to one Byram. Defendant proposed to show that the mortgagor had said to Thomas Ashley that he would apply the proceeds of such cattle on plaintiff's mortgage. This evidence was ruled out upon objection, and complaint is made of the ruling. The ruling was clearly right. If it had been admitted, it would prove nothing material to be considered. Thomas Ashley was a nephew of the mortgagee. He had no interest in the mortgage nor any authority over it. It was not proposed to prove that the proceeds were, in fact, paid to him nor to the mortgagee. That the mortgagor should say that he would do it was not the equivalent of doing it. The rejected evidence had no tendency to prove either payment or estoppel.

The trial court properly directed the verdict, and its judgment must be—*Affirmed.*

---

ROBERT JONTZ, Appellant, v. H. S. NORTHUP, Appellee.

**Drainage:** SURFACE WATER: NUISANCE: DAMAGES: EVIDENCE. A land-owner may collect the surface water upon his land in a channel and discharge it into a natural swale or depression, and unless he substantially increases the volume, or discharges it in a negligent manner so as to injure his neighbor, he is not guilty of creating a nuisance, nor is he liable in damages; and he may thus drain the sloughs and wet places, but is not at liberty to discharge the water from large lakes or ponds on his land onto the land of others. The evidence in this case is held insufficient to show that defendant exceeded his lawful rights.

*Appeal from Jasper District Court.*—HON. W. G. CLEMENTS, Judge.

WEDNESDAY, OCTOBER 23, 1912.

ACTION to enjoin a nuisance caused by the casting of water by defendant upon plaintiff's land and to recover damages for the continuance of the nuisance. Defendant denied the alleged nuisance and pleaded that he did no more than discharge the water from his land upon the land of the plaintiff, which was the servient estate, into a natural swale or water course. On these issues the case was tried to the court, resulting in a decree dismissing plaintiff's petition, and he appeals.—*Affirmed.*

*McClain & Campbell*, for appellant.

*Mowry & Cross*, for appellee.

DEEMER, J.—Plaintiff and defendant are owners of adjoining tracts of land; plaintiff's consisting of eighty acres composed of two forties running east and west, and defendant's of eighty acres running north and south. What is known as the North Skunk river, flowing in a southeasterly direction, crosses the southwest corner of plaintiff's land, and a swale or slough running in the direction of this river commences north of the north end of defendant's land with branches coming in from both east and west. After these converge, a main slough extends entirely across defendant's land following the natural course of drainage down onto the land owned by plaintiff, and from there into North Skunk river. This slough or swale drains the surface water from about four hundred acres of land and varies in width with the contour of the ground. It had a fall of twenty-four feet across defendant's land. Save in dry seasons water constantly ran down this swale or slough, and during the spring floods was at times three and four feet in depth. Commencing at the Skunk river south of plaintiff's land there was an open ditch of natural origin running back northward upon plaintiff's land and to a point within two hundred feet of the line between the

two tracts of land. At its southern extremity this ditch is quite large and deep, requiring a bridge to cross it; but it decreases in depth as one nears its source. North of defendant's land were a number of open ditches, which, after converging, pass under a fourteen foot bridge in the highway, and enter defendant's land at the north line. This open ditch continued on southward through defendant's land to a point within eighty rods of the north line of plaintiff's land. There the ditch lost its identity and the water spread out over defendant's south forty.

It will be observed from this statement that the natural flowage of water was from north to south across the land of both parties, and that there were natural open ditches along the entire course save for about eighty rods on defendant's land, and for about two hundred feet on the land of plaintiff. At these points the water naturally spread out over the land and had no well-defined channel. Some time in April of the year 1908 defendant constructed a ditch upon his land from the end of the open ditch southward to within three or four rods of plaintiff's land, there changed its course at right angles, and ran it seven or eight rods westward parallel with the division line between the two tracts, and there stopped at what is called the "west pasture fence." He contends that he stopped the ditch at a point where the water ordinarily and naturally had always passed from his land upon that of plaintiff. This ditch was made with a plow, and consisted of a double furrow except at a boggy spot where a spade was used, and a ditch of about the same depth as the furrow was cut for a distance of about three rods. It is this ditch or furrow constructed by defendant which is complained of as constituting a nuisance. It might properly be here stated that plaintiff is the owner of another tract of land lying north and east of that owned by defendant, and that he (plaintiff) has for a long time run a tile from this land down to the open ditch on defendant's land near its south end. Plaintiff contends

that the open ditch complained of casts water upon his land which did not go there before, that prior thereto it was absorbed by the soil and evaporated from small ponds or low places where it was collected, and that the ditch made by defendant gathered this water and discharged it upon his land in increased quantities and made it unfit for cultivation. It is not claimed that the water is discharged from the ditch at a point where the surface water did not theretofore go, but it is contended that the channel was changed on defendant's land and water collected therefrom and discharged on plaintiff's land in increased quantities. It also appears that before the cutting of the ditch plaintiff had tiled out that part of his land adjoining that owned by the defendant by putting in four lines of tile, one at the west of the slough, another at the east, and another near the center, with a network of cross-tiles near the partition fence. This system of tiling practically reclaimed plaintiff's land, but after defendant dug his ditch the tile would no longer carry the water coming upon him from the north. After the ditch was dug plaintiff, as we understand it, opened up the string of tile running north and south at the north end thereof and put in a barrel, with the thought that the water coming from defendant's land would be taken care of by the tile; but he testified that this ditch caused sediment and debris to wash into the barrel filling it up so that the water could not get into the tile, and that the water and debris had already filled up what is called the west tile. He also claimed that the water from the ditch spread out over his land and made at least one-half acre of land entirely unfit for cultivation. He also claims to have spent several days in cleaning out the barrel which he placed at the end of his tile.

His testimony as to this tile and barrel was as follows: "I turned the water into the barrel to keep it from running over me. When it breaks out it spreads four or five feet. There has been an overflow there since I put in my

tile; high water all over. I don't remember that it filled up the barrel that time at all. I have the worst of it cleaned out now, and I took a spade and cleaned it out. There is a big hole punched in the barrel now, but I don't know how it got there. That hole is going to fill up that string. I did not see that hole made, but I could stop it up if it would be left alone." Another witness said of the tiling and the barrel: "Mr. Jontz showed us where his tile was, and I remember at the head of the tile was a trough to the barrel across the end of this ditch that run the water into one of those tile. There was one of the strings of tile that they told us wasn't working very well. They complained it hadn't been put in right. Mr. Jontz told me it wasn't working right. I saw this slough again in December, 1909. There was water running down the ditch. Mr. Jontz turned it into one of his tile ditches to straighten the trend and make the water run into his tile. The tile carried away all that was running then. It was a small ditch. It was wider than a plow furrow but for depth, I could not tell." And another said: "The ditch at the partition fence was not large. There was not very much water running down. That was in November, last fall. The general condition of the ground at that time was dry. There was just a small stream running. Mr. Jontz showed us where it went. He had it tiled. It run by his tile."

We are satisfied, however, from the entire testimony, that the defendant did not cause what is known as the west tile line to fill up, and that the tile into which plaintiff has turned the water generally takes care of that which comes through the ditch dug by the defendant; and we are further satisfied that the point of discharge of the water carried by that ditch is at the lowest place in the depression. Such being the facts, what is the law?

It would seem, if we are to follow what is said in the old case of *Livingston v. McDonald*, 21 Iowa, 160, and



what is said in *Stinson v. Fishel*, 93 Iowa, 656, that plaintiff has made out a case; but in recent cases there has been a departure from the doctrines there announced, and both the Legislature and the people in their sovereign capacity have undertaken to make it possible for wet lands to be reclaimed, even if by so doing the upper proprietor collects surface or percolating water and discharges it in increased quantities upon the land of his neighbor, provided, of course, that the natural course of drainage be followed. Section 1989-a53 of the Code Supplement reads as follows: "Owners of land may drain the same in the general course of natural drainage, by constructing open or covered drains, discharging the same into any natural water course, or into any natural depression, whereby the water will be carried into some natural water course, and when such drainage is wholly upon the owner's land he shall not be liable in damages therefor to any person or persons or corporation. Nothing in this act shall, in any manner, be construed, to affect the rights or liabilities of proprietors in respect to running water or streams." And the people in their sovereign capacity adopted the following amendment to the Constitution in the year 1908: "Add to section eighteen of article one of the Constitution the following: The General Assembly, however, may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes across the lands of others, and provide for the organization of the drainage districts, vest the proper authorities with power to construct and maintain levees, drains and ditches and to keep in repair all drains, ditches and levees heretofore constructed under the laws of the state, by special assessments upon the property benefitted thereby. The General Assembly may provide by law for the condemnation of such real estate as shall be necessary for the construction and maintenance of such drains, ditches and levees, and pre-

scribe the method of making such condemnation." See also, 33d G. A. chapter 117.

Even before the adoption of the statute quoted we had recognized the right of an upper owner to drain his land onto that of his neighbor under proper circumstances. See *Dorr v. Simmerson*, 127 Iowa, 551. Since that time we have announced the following as the rule for such cases: "Without departing from the well-established rules with reference to surface drainage, this court as now constituted is inclined to construe them as liberally as is possible in order that reclamation of low and wet lands may be accomplished in the interest of good husbandry and for the general welfare of all." *Wirds v. Vierkandt*, 131 Iowa, 128. See, also, *Parizek v. Hinek*, 144 Iowa, 563.

In *Hull v. Harker*, 130 Iowa, 190, we said: "That the swale which we had referred to constitutes the 'natural water course' or the 'natural depression' referred to in the statute is plain from the evidence. To constitute a natural water course, it is not necessary that the flow of water through it shall have been 'sufficient to wear out' a channel or canal, having definitely defined, well-marked sides and banks. If the surface water in fact uniformly or habitually flows off over a given course having reasonable limits in width, the line of its flow is, within the meaning of the law, applicable to the discharge of surface water, a water course." See, also, *Lambert v. Alcorn*, 144 Ill. 313 (33 N. E. 53, 21 L. R. A. 611).

This entire matter received full consideration at the hands of this court in the recent case of *Obe v. Pattat*, 151 Iowa, 723, from which we make the following quotations:

Since the decision of *Livingson v. McDonald*, 21 Iowa, 160, numerous cases involving the law of surface waters have come before this court for consideration. In many instances that precedent has been approved and followed, and in others it has been distinguished or held inapplicable,

The tendency of the holdings is to recognize neither the rule of the common law nor the rule of the civil law as being in all cases controlling to the exclusion of the other. See *Livingston v. McDonald*, *supra*; *Vannest v. Fleming*, 79 Iowa, 641; *Matteson v. Tucker*, 131 Iowa, 511, and cases there cited. (1) But in the absence of any statute affecting the situation, the doctrine of the civil law has been more frequently applied in cases of drainage of agricultural lands. As construed by the court, that rule, so far as it applies to the case before us, is that, while the owner of the dominant estate may insist on the surface waters having free flow from his lands in accordance with natural conditions and may himself interfere with such flow so far as the same is affected by the ordinary operation of good husbandry, he can not lawfully collect it into a mass and discharge upon his neighbor's premises 'in greatly increased or unnatural quantities to the substantial injury of the latter.' The quoted phrase is from Judge Dillon's opinion in the *Livingston* case, and accepting it as the essence of the doctrine of that oft-quoted precedent, it is undoubtedly still the law except as limited or changed by subsequent legislative action. As thus stated, it will be observed that, to call the law into action for the defense of the servient estate, the collection and discharge of water thereon in other than the place of its normal flow with the land in a state of nature it must be in 'greatly increased or unnatural quantities,' and that the damages which will sustain a right of action for such alleged wrong must be 'substantial' in character. In other words, the general doctrine which recognizes a merely technical invasion of one's premises or the infliction of a merely nominal injury as sufficient grounds for invoking the remedies of the law have here no application. To lay it down as the law that no man may so ditch or drain his premises that surface water shall be discharged therefrom in any other manner or at any other place or in any other quantities than would characterize its flow, were the land left in a state of nature, would be to effectively block the progress of agricultural improvement over a very large part of the state. The purpose and essence of drainage is to interfere with natural conditions as to surface water, to gather it into tiles or open ditches, and convey it to some place of discharge. If it is to be of

any effect at all, the water cast from the mouth of the drain must be greater in quantity than would be discharged at that point under natural conditions. Even without a statute the rule of the adjudged cases is, as above stated, that the adjacent owner can not rightfully complain of the flow thereby cast upon him unless it be in such greatly increased or unnatural quantities as to be the cause of substantial injury to his premises. *Vannest v. Fleming*, 79 Iowa, 638; *Wharton v. Stevens*, 84 Iowa, 107; *Dorr v. Simmerson*, 127 Iowa, 551. Recognizing, doubtless, the necessity of encouraging reasonable methods of drainage and the advisability of a statutory rule which would put an end to such wasteful litigation, the Thirtieth General Assembly (Acts 30th Gen. Assem. chapter 70) enacted the provision which is embodied in Code Supp. 1907, section 1989-a53.

This case has been followed in: *Valentine v. Widman*, 156 Iowa, 172, and in cases from many other states which have the same drainage problems. See *Lambert v. Alcorn*, 144 Ill. 313 (33 N. E. 53, 21 L. R. A. 611); *Perry v. Clark*, 89 Neb. 812 (132 N. W. 388); *Aldritt v. Fleischauer*, 74 Neb. 66 (103 N. W. 1084, 70 L. R. A. 301); *Flesner v. Steinbruck*, 89 Neb. 129 (130 N. W. 1040, 34 L. R. A. (N. S.) 1055); *Manteufel v. Wetzel*, 133 Wis. 619 (114 N. W. 91, 19 L. R. A. (N. S.) 167); *Shaw v. Ward*, 131 Wis. 646 (111 N. W. 671, 11 Ann Cas. 1139); *Rieck v. Schamanski* (Minn.), 134 N. W. 228; *Boll v. Ostroot*, 25 S. D. 513 (127 N. W. 577).

Such a rule is wholesome and is especially applicable to conditions as they exist in this state, if we are to properly conserve our own interests and to reclaim our agricultural lands. We shall not take the time to discuss or analyze previous cases. They can not all be harmonized, and it is useless to demonstrate the point of departure. Suffice it to say, we do not think plaintiff has shown such an increase in the flow of water upon his land or such a change in the natural course of surface

water as authorizes a recovery. There was no increase save as the ditch collected water which theretofore spread out over the land and was evaporated or absorbed; but this is not sufficient to justify a recovery. Defendant did nothing with his land save to collect the water into a channel and discharge it into a natural swale or depression, and this he had the right to do unless he substantially increased the volume of water or negligently discharged it so as to injure his neighbor. The maxim, "*Sic utere tuo ut alienum non laedas*," applies in such cases, but not to the extent of prohibiting the proper drainage of surface or percolating water into a natural water course or depression. This whole matter is quite fully covered in a note to *Manteufel v. Wetzel* reported in 19 L. R. A. (N. S.) 167 et seq. See, also, *Shaw v. Ward*, 131 Wis. 646 (111 N. W. 671), reported in 11 Ann. Cas. 1139, and note.

We are not to be understood as holding that one may thus drain out large lakes or ponds upon his own land to the land of another; but that he may so drain sloughs or wet places we have already decided. Such drainage must be done in a proper manner and so as not to substantially increase the flow. The facts in this case do not show such increase as to justify interference by the courts.

It follows that the decree must be, and it is, *Affirmed*.

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J. A. OAKES, Appellant, v. THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, et al., Appellees.

**Railroads:** INJURY TO PASSENGER: SETTLEMENT; MENTAL CAPACITY: EVIDENCE. In this action for injury to plaintiff while a passenger on defendant's train, the evidence is reviewed and held insufficient to show that plaintiff was mentally incompetent when he made a settlement for his injuries, but rather that he fully comprehended and appreciated his acts in accepting a check in settlement and in his use and disposition of the proceeds of the check.

*Appeal from Lucas District Court.*—HON. F. W. EICHELBERGER, Judge.

THURSDAY, OCTOBER 24, 1912.

ACTION for damages for personal injuries. At the close of the evidence, the trial court directed a verdict for the defendants. Plaintiff appeals. *Affirmed.*

*W. W. Bulman, and J. A. Penick, for appellant.*

*Stuart & Stuart, for appellees.*

EVANS, J.—Plaintiff averred in his petition that on May 2, 1910, he was injured through the negligence of the defendant's employees while riding as passenger on one of its trains. He also averred that about five weeks later a contract of settlement and release was fraudulently obtained from him by the defendant while he was mentally incapacitated as the result of such injury. It appeared from the evidence that immediately following the accident the nature and extent of plaintiff's injury was not easily ascertainable. There were no broken bones nor visible marks. The accident occurred in Missouri. The plaintiff went to a hospital at St. Joseph and there remained for about five weeks at the expense of the defendant company. At the close of this period, the purported contract of settlement was entered into whereby the defendant company agreed to pay the plaintiff \$1,212. It delivered to him its check or voucher therefor in pursuance of the agreement of settlement. It is the claim of the plaintiff that he knew nothing of such contract of settlement, and that he signed the same while in a state of practical unconsciousness. The plaintiff left the hospital and went to Trenton, Mo., his former home. While there he claims to have discovered for the first time that

he had possession of defendant's check for the amount of the settlement. He immediately consulted with an attorney in such town, one Hubbell, and left the check with him to be returned to the defendant. Hubbell immediately returned the same with the following letter: "Hon. O. M. Spencer, General Solicitor C. B. Q. Ry. Co., St. Joseph, Mo.—Dear Sir: Herewith I am returning to you draft No. 2946 dated June 6th, 1910, in the sum of twelve hundred and twelve dollars (\$1212.00) issued to my client Mr. Jesse A. Oakes. Mr. Oakes was severely injured at Ridgeway, Missouri, on May 2d, 1910, and this draft was given to him in settlement, at St. Joseph, and he signed a release, which settlement was made and which release was signed under such circumstances that I deem the whole transaction voidable in law—not binding on anyone—and very far from what is just and right. If your company desires to take up an equitable settlement of this case, Mr. Oakes will be glad to settle the case fairly; otherwise it is a matter that will have to be determined by the courts. Very respectfully, [Signed] Platt Hubbell." The defendant returned the check to Hubbell, insisting upon the regularity of settlement. To such letter Hubbell replied as follows: "June 16, 1910. O. M. Spencer, St. Joseph, Mo.—Dear Sir: After Mr. Oakes had returned home and had rested awhile and being under the care of his home physician, he felt some better and decided he had rather take the draft than to bring suit. Therefore he will have the draft cashed and the incident will be closed. Very respectfully, Platt Hubbell." The plaintiff denies the authority of Hubbell to write the second letter, and denies that he was acting as attorney for him when he wrote the same. It is undisputed, however, that the plaintiff did receive back from Hubbell the check or draft, and on June 24th following he cashed the same at Chariton, Iowa, by indorsement thereof to the Chariton Nat-

ional Bank. He received from such bank \$12 in currency and a certificate of deposit for \$1,200. Later such certificate of deposit was deposited to his credit in another bank, and the proceeds thereof were drawn and used by him in various ways. The trial court held that the plaintiff had thereby waived the fraud if any in the settlement and waived his right to repudiate the same; and that his conduct subsequent to the discovery of the alleged fraud amounted to a ratification of the settlement. Upon the face of the record, such holding was manifestly correct, and in accord with the authorities hereinafter cited.

As avoiding the effect of this apparent conduct, however, it was the contention of the plaintiff that he was mentally incapacitated when he cashed the check, and that that also was done without conscious knowledge on his part. The question before us at this point, therefore, is whether the evidence would sustain a finding of mental incapacity in the plaintiff in the matter of cashing the check and using the proceeds thereof. The direct evidence of the plaintiff at this point was as follows:

Q. What, if anything, did you do with the check?  
A. Well, I don't remember exactly what I did with it.  
Q. What have you learned that you did with it? A. I heard I cashed it.  
Q. What, if anything, did you do with the money? A. Well, I don't know altogether what I did do with it. I paid some of my expenses.  
Q. Can you account for considerable of it? A. Yes, sir.  
Q. Do you remember the occasion of your cashing it? A. No, sir; I don't remember when I cashed it exactly.  
Q. Do you remember at what bank you cashed it? A. No, sir. (On cross-examination he testified as follows): 'Q. Where was Mr. Hubbell when you saw him? A. In his office. Q. How did you happen to go there? A. Because I didn't want that check when I found out I had that check. Q. You went to him knowing him to be a lawyer? A. Yes, sir. Q. You placed the check in his hands? A. Yes, sir. Q. Then in a few days you got the check back? A. I told him to return the check. Q. He got it back some way,



and gave it to you again? A. Yes, sir. Q. What did you do with it then? A. He told me that they would not accept it, and for me to take it and cash it. Q. Then you came to Chariton? A. Yes, sir; shortly afterwards I came to Chariton? Q. Where did you take that check? What did you do with that check? A. Well, I don't remember just what I did do with the check. Q. What do you think you done with that check? A. Well, I was told it was cashed. Q. Where did you take it? A. I don't know; to some bank I think. Q. Are you acquainted with Mr. J. C. Copeland? A. Well, just slightly. Q. You knew him when you saw him? A. I don't know positive. Q. You know he is an officer? A. I only know he belongs to the bank. Q. Did you have a conversation with him when you gave him the check? A. I don't remember. Q. Did he give you any money in any shape whatever? A. I don't remember. Q. Don't you know just as well as you know you are living that he gave you a certificate of deposit for \$1,212? A. No, sir; I do not. Q. Have you found out since that he gave you a paper? A. Yes, sir; I understand he has. Q. When did you first find out that he had given you a certificate of deposit for this check? A. Since this lawsuit was begun. Q. You came to your senses about the time this suit was commenced, did you? A. No, sir; not any more than any other time. Q. Are you crazy yet? A. No, sir; not at present. Q. I will ask you if you are sane at this time? A. No, sir; I am not entirely sane. Q. You have answered a good many questions, haven't you? A. Yes, sir; but I have been preparing for this. Q. For this case? A. Yes, sir; I have been taking a rest cure and trying to regain my thoughts. Q. You did find out that you had this check? A. I don't know positive, only I heard I had. Q. Didn't you get something for this check? A. Not that I know of. Q. Haven't you found out since that you did? A. I heard I had. Q. Did you go back to Trenton after you came here? A. Yes, sir. Q. What did you go back to Trenton for? A. I believe I went back there to see Dr. Winingham. Q. After you left the hospital and came up here, you say you went back to Trenton to see Dr. Winingham? A. Yes, sir. Q. How long did you stay in Trenton at that time? A. Well, I

don't remember exactly, but I think one night. Q. Then where did you go? A. I came back to Chariton. Q. What money did you have at the time you were injured? A. I didn't have any, only a few cents of expense money that the house had furnished me. Q. You haven't earned any money since then? A. Not one cent. Q. You had no property, did you? A. No, sir. Q. You had no home? A. No, sir. Q. Don't you know he gave you a certificate of deposit for \$1,212, and you took it to the Savings Bank here and deposited it? A. No, sir; I don't know it. Q. Do you say you haven't any money in the Savings Bank today? A. Yes, sir; I say I have no money there today. Q. Have you checked it all out? A. Yes, sir. Q. For what purpose did you check it out? A. For sickness, nurse hire, and doctor bills. Q. The entire \$1,212? A. I don't know. I know I ain't got any of it now, not to my knowledge. Q. How did you pay out this money? A. I don't remember. Q. Did you issue checks on the bank? A. Well, I did for awhile, while I was up and around. Q. What time was you up and around? A. Well, I was up and around when I first came here for awhile. Q. What portion of the time since you came up here from the hospital that you would walk around town with the aid of a cane? A. Well, the first few months while I was here part of the time. Q. That would be July, August, and September, would it? A. I think so. Q. This time that you were walking around town did you draw some checks on the Savings Bank? A. Yes, sir. I kind of think I did. Q. How many do you think you drew? A. I don't know. Q. That was when you was walking around? A. Yes, sir. Q. How did it occur to you that you had money there to draw against? A. Well, I went in there to get some change. and they wanted to know of me if I didn't have some money there, and I told them I didn't know. Q. They wanted to know if you didn't have some money in their bank? A. Yes, sir. Q. What did you say? A. I told them I didn't know. Q. Then what did they say? A. They says you have. Q. Did they tell you how much? A. No, sir. Q. Did you ask how much? A. I don't remember. Q. Why didn't you ask how much? A. I don't remember. Q. That was a surprise to you, was it not, that you had some money in the bank? A. Yes, sir; it was.

Q. Then you went to work to find how you got it there, didn't you? A. No, sir. Q. Why didn't you? A. I didn't care how I got it. Q. Do you have any idea who put that money there for you? A. I didn't know but my brother did. Q. Did you ask him? A. Yes, sir; but he said he didn't. Q. Then it was a mystery to you how that money got there? A. Yes, sir. Q. Did you ask the bank how much it was some fellow had left there? A. I don't remember of ever asking. Q. Why didn't you? A. Because I have got money in the bank, I don't go and ask the banker how much I have got. I just go there and check it. Q. You usually know? A. No, sir. He notifies me how much I have got when it is all checked out. Q. You never pay any attention yourself to how much money you have got in the bank? A. No, sir. Q. Suppose there is money in the bank that you can't account for at all, \$1,212? A. I didn't know. Q. You thought it was there? A. No, sir. Q. How much did you think there was of it? A. I didn't know. Q. I am asking you why you didn't inquire? A. Because I didn't consider that any of my business. As long as I have got money, that is all I care. If I pay my bills, that is all I care. Q. Then some fellow without your knowledge and consent had gone there and left a lot of money for you? A. Yes, sir. Q. You say that is none of your business? A. As long as it was for me, that is all I care. Q. That was not a very common thing for people to come around and deposit money in the banks for you? A. Yes, sir; I have had that done before. Q. And you never would find out where it came from? A. I didn't care. Q. Don't you know that is all a mistake? Don't you know you took that money there and deposited it? A. No, sir; I don't. Q. I am going to give you another chance to explain to this jury after you found quite a large sum of money had been deposited in the bank why you didn't take some steps to find out where it came from. A. Because I didn't care. Q. Did you suppose some fellow was giving you that money? A. I didn't know what to suppose. Q. That never bothered you enough? A. I have had lots of money. Q. You thought some fellow had given this to you? A. Yes, sir.

Plaintiff's testimony in his own behalf in response to

the examination of his counsel evinces indisputable consciousness of all the events and circumstances which tend to the proof of his case. His cross-examination evinces the same thing, notwithstanding his formal denials. To illustrate: The deposit of the \$1,212 check was made with Copeland, cashier of the Chariton National Bank, who was called as a witness by defendant, and who testified to the circumstances. The plaintiff rebutted this testimony as follows:

Q. Why did you ask Mr. Copeland whether or not your creditors could get that money if you left it in his bank? A. I didn't. Q. That statement isn't true then? A. No, sir; that is a lie. Q. Did you talk to him at all about any person getting your money? A. I did not, sir; not a word. Concerning his attorney and the receipt of the check from him, he testified as follows: 'Q. Do you remember of this lawyer, Platt Hubbell at Trenton? A. Yes, sir; I do. Q. When you gave the check back that you have told about, what, if anything, did you say about employing him any further? A. He had a letter in his hand, and he pulled a check out. I think there was two letters in one envelope. He says, 'Here is your check.' I said, 'All right. I am done with you. I don't want any more transactions whatever with you. The Burlington bought you off.'

Reading the plaintiff's testimony as a whole, we are clear that it furnishes no support to the contention that he acted unconsciously in receiving the check from his attorney and in cashing the same at the Chariton National Bank. His conscious knowledge of his act is disclosed too unmistakably by his own testimony, and this sometimes while in the act of denial.

Upon this state of the record, the case comes squarely within our previous cases, and is quite controlled thereby, and the trial court properly so held. *Coles v. Terminal R. R. Co.*, 124 Iowa, 56; *Keck v. Insurance Co.*, 89 Iowa, 200; *Wallace v. C., M. & St. Paul Ry. Co.*, 67 Iowa, 547; .

*Nason v. Ry. Co.*, 140 Iowa, 533; *Petersen v. Ry. Co.*, 36 Minn. 399 (31 N. W. 515.)

Our conclusion at this point is decisive of the case, and we need not consider other features thereof.

The judgment below is accordingly *affirmed*.

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GEORGE C. ANDERSON, Appellant, v. CHARLES A. PATTEN,  
Appellee.

**Principal and agent: POSSESSION OF PROPERTY BY AGENT: AUTHORITY**

1 **TO SELL.** The mere possession of property by one not the owner is not sufficient to establish agency or authority to sell on his part; but the property may be left with him by the owner under circumstances indicating that it was for sale. Thus where it conclusively appeared that plaintiff's agent was authorized to dispose of buggies through a scheme of selling coupon books at a race meeting, and after the meeting the buggies were left in his possession, the question of his then actual or apparent authority to sell for cash was for the jury.

**Same: APPARENT AUTHORITY.** An agent's apparent authority to sell

2 an article belonging to his principal must be determined by the acts of the principal and not those of the agent; and a third person can only rely upon actual apparent authority, and he must deal in reliance thereon in good faith and in the exercise of reasonable prudence.

**Evidence: STRICKEN WHEN NOT RESPONSIVE.** A party is entitled to

3 have an answer not responsive to his inquiry stricken out for that reason.

**Principal and agent: AUTHORITY OF AGENT TO SELL: EVIDENCE.** In

4 this action to recover a buggy which plaintiff's agent had sold defendant at the close of a fair or race meeting, which had been exhibited and the agent had attempted to sell by means of a coupon scheme, it was competent for plaintiff to show a custom of exhibitors to sell such articles as they could during the meeting or after its close, as bearing on the agent's authority to sell.

**Same: INSTRUCTION.** It is not the law that one in good faith pur-

5 chasing property from a person simply intrusted with the same acquires as good title as though he had dealt with the real owner; and the instruction to that effect in this case was erroneous.

**Same:** AUTHORITY OF AGENT: EVIDENCE. The declarations of an agent 6 are not competent on the question of his authority; and the instruction in this case permitting the jury to consider such declarations along with the other evidence in the case was erroneous.

*Appeal from Linn District Court.*—HON. MILO P. SMITH,  
Judge.

THURSDAY, OCTOBER 24, 1912.

ACTION in replevin for the possession of a buggy. There was a judgment for defendant, from which plaintiff appeals.—*Reversed.*

*Voris & Haas*, for appellant.

*F. L. Anderson*, for appellee.

LADD, J.—There were horse races at Marion July 4 and 5, 1910, and plaintiff was in attendance. He shipped three buggies in the same car with his horses and placed in charge of them one Willard, who arranged for the storage of two of them in a shop and, after obtaining permission of the city authorities, exhibited the other near the park. Willard had accompanied plaintiff from Des Moines, where the latter had bought the buggies, in order to carry out a scheme entered into at the suggestion of Willard, and which is best explained by plaintiff:

The method of handling the coupons was this: There was a book of coupons with five coupons in a book, and the book sold for \$20. A party purchasing one of the books would sell a coupon for \$4, and the purchaser would send the coupon with \$20 into the office, and his name was taken, and every coupon that came from his book was credited to the owner of the book, and when he had disposed of five books of coupons he had a buggy

shipped to him from the factory. The coupons in all cases had to be sent in so that a record could be kept of them there.

A purchaser of coupons in this way could only get his buggy by sending his coupons in to the office and getting credit for them. The buggy of course, had to be shipped from the office. I had made arrangements with the Capital City Carriage Company to procure the buggies from them as I needed them. The three buggies were shipped to Marion, to be shown as samples of the buggies that would be received on the coupons. There were three kinds of buggies; the factory price on one was \$60, one \$48.75, and one \$40. The best buggy was the sample of the buggy that would be sent out on the sale of the five coupon books. One selling four books of coupons got the second grade of buggy; and for the sale of three books the cheapest buggy was sent. If only two coupon books were sold, the seller would get a set of double harness. For disposing of one book he would get a single harness. Every coupon was redeemable in merchandise.

These coupons were to be redeemed by the Uncle Sam Buggy Company, which was plaintiff. Willard was to start the sale, and as his commission was to receive \$4 for every book sold. A couple of days after the races, Willard sold the buggy to defendant for \$50, and the parties have not been in communication with him since. The defendant, who had first seen Willard exhibiting the buggy near the park and at the fair ground, testified that it was customary for those exhibiting at the fair ground to sell what they could after the race meeting or fair was over, and further:

Four or five days after I bought the buggy, the plaintiff, Mr. Anderson, came to my barn, and we talked the matter over. He said Willard had no right to sell it, only on a coupon order or coupon book, or something of that nature. I didn't understand the way they were selling the books. He told me he had entered into a contract with this man to sell these buggies; that he had bought the buggies himself and sent them here with Willard for him to dis-



pose of—he claimed strictly on some sort of a coupon order is the way they were to be disposed of—and said the buggies didn't belong to Willard; that they belonged to him. He said Willard proposed the scheme to him in Des Moines. He said Willard put up collateral of some kind to make him safe in the buggy deal, and he had written east to Washington to find out about the collateral, and it was a forgery, and he showed me a letter from Washington. I can't remember the contents of the letter, only that Mr. Willard was a fraud. Anderson showed me the letter, which was directed to his father at Des Moines. Anderson told me his father was a salesman or something for the Capitol City Buggy Company, and the buggies were to go back to the factory if not sold. He said he got suspicious of these securities, and that either he or his father wrote to Washington and received the letter back that Willard was a fraud, and that if he had telegraphed to Marion immediately on receipt of the letter Willard could have been detained before he got away from here. In that conversation with the plaintiff, he told me that Willard had entered into an agreement to sell these buggies here at Marion, and was to have half the profits, and they had to account to the factory \$60 for this buggy, and the sale price was \$100. I told plaintiff that if Willard was in possession of these buggies as agent, and selling them, I didn't see where he could come onto me for the buggy, or any damages whatever. He said they had lost enough money on Willard already, and they couldn't afford to lose any more, and wanted to settle with me, and that rather than have any fuss they would rather lose part of it, and if I would pay part of what the buggy was worth I might keep it. I don't know who he meant by 'we.' He said, 'We have lost enough already,' when speaking to me. He said Willard had authority to sell the buggy, the way I understood it for him.

On cross-examination he testified that plaintiff "told me that Willard was selling buggies for him on coupon orders, or something along that line, was selling coupon books, and something to the effect that Willard didn't have authority to sell the buggy, but that it was his business to sell the coupons. Anderson claimed to me that he had no



authority. He claimed he had authority to sell the buggy on the coupon order. He did tell me, in effect, that Willard didn't have any right to sell the buggy to me, but only had a right to sell coupons, and he demanded that I pay for the buggy; wanted to settle it. Said he was willing to lose some if we could get together and settle. Didn't want any costs or trouble; didn't want me to lose it all; and didn't want to lose it all himself."

He also swore that in buying he was not aware that plaintiff was interested in the buggy, but knew he was getting it for less than factory price.

The plaintiff's version of the talk was that he explained to defendant the arrangement between himself and Willard as previously recited.

Two issues were submitted to the jury: (1) Whether Willard had actual authority to sell the buggy, and, if not, (2) whether he had ostensible authority so to do.

I. The scheme concocted seems to have been in the nature of an endless chain as applied to customers, and, had it worked as well in fact as in theory, probably nearly

every one by this time would have become a patron or victim of plaintiff, acting under a fictitious name. People did not seem to take kindly to the net spread for them, how-

ever, and Willard found it easier to sell buggies than books with which to procure them. Of course, the mere possession of the buggies by Willard was not alone enough to establish agency or authority to sell on his part. *Baehr v. Clark*, 83 Iowa, 313; *Gilman Oil Co. v. Norton*, 89 Iowa, 434; 1 Mechem on Sales, section 156; 31 Cyc. 1252. But the buggies were left with him by plaintiff after the races were over, under circumstances, in view of a custom, indicating that they were for sale. Moreover, according to defendant's testimony, plaintiff admitted that Willard had them for disposition through selling books, although he testified seemingly to his own conclusion, that "the buggy,

1. PRINCIPAL AND  
AGENT: posses-  
sion of  
property by  
agent: author-  
ity to sell.

of course, had to be shipped from the office." That the jury might have found he was authorized to dispose of the buggy through the scheme of first selling books and exchanging it for these can not be doubted; and, if he might do this indirectly, it was fairly to be implied that he might do so directly for cash. The plaintiff had left him in charge of the buggies a long distance from his office without having disposed of the books entrusted to him, and we are of the opinion that whether the sale for money was within the scope of his authority was for the jury to decide.

II. Apparent authority always must be determined by the acts of the principal, and not those of the agent. *Wierman v. Bay City Sugar Co.*, 142 Mich. 422 (106 N.

2. SAME:  
apparent  
authority.

W. 75); *Dispatch Printing Co. v. National Bank*, 115 Minn. 157 (132 N. W. 2). "The

authority must have been actually apparent to the third person, who, in order to avail himself of rights thereunder, must have dealt with agent in reliance thereon in good faith and in the exercise of reasonable prudence."

31 Cyc. 1333. The defendant testified that in buying he relied solely on what Willard said and upon the fact that he was in possession of the buggy. Therein he did not exclude the circumstances of such possession, such as that Willard had been exhibiting it at the race track and at the park, that he had remained with the buggies after the races were over, and the custom of buggies being left for sale thereafter. These matters, in connection with Willard's possession were enough to carry the issue to the jury as to whether he was clothed with such ostensible authority to sell as that the defendant was justified in relying thereon.

III. Byers after testifying to the storage of two crated buggies by Willard in his father's wind mill shop,

3. EVIDENCE:  
stricken  
when not  
responsive.

and, on cross-examination, that Willard had paid nothing, was asked: "Of course, you didn't know who Mr. Willard was working for, if anybody, did you? A. When he came there, he

told me he was interested in these buggies." Plaintiff moved the answer be stricken as not responsive and as hearsay, and this motion was overruled. This was error. The answer was not responsive, and, for that reason, the party interrogating was entitled to have it stricken and the witness required to respond to the question as propounded.

IV. The defendant, after testifying to the exhibition of the buggy near the park and at the races by Willard and the purchase of the buggy of him, was asked whether or not

4. PRINCIPAL AND AGENT: authority of agent to sell: evidence. "you are acquainted with the custom and usage of men exhibiting buggies at race meetings and fairs about Linn county and in this part of the state, with reference to selling the same at the places they are exhibited after the race meeting is over?" This was objected to as incompetent, irrelevant, and immaterial and not tending to support any issue in the case, and as calling for the opinion of the witness, and the objection overruled. "A. Yes; I am. Q. What is the custom?" A like objection was overruled, and the witness answered: "It is the custom to sell what buggies they can after the fair is over, or during the fair." The evidence was admissible as bearing on whether defendant in buying relied on Willard having authority to sell, and, if shown to have been general or known to plaintiff, would have borne on whether he had authorized Willard to sell. *Kaufman v. Manufacturing Co.*, 78 Iowa, 679; *Hichhorn v. Bradley*, 117 Iowa, 130.

V. Exception is taken to the fifth instruction, which reads:

A person dealing with an agent in regard to personal property intrusted to the latter by the principal, without knowledge that the property is not owned by the agent, but  
5. SAME: instruction. supposing him to be the owner thereof and the principal in the transaction with him, will possess all the rights he would have acquired had the transaction been with the real owner. If you find in this case that the plaintiff had committed the buggy in question

to the hands of Willard for exhibition or sale in a particular manner, and that Willard took possession for that purpose, and as a reasonable man plaintiff knew, or should have known, that the possession and control over the property by Willard would lead a purchaser without knowledge of the true owner to buy from Willard in a manner different from that contemplated by him and Willard, and the defendant, without notice that the plaintiff was the real owner, purchased the buggy from Willard at a reasonable price, then he acquired title thereto, and you should find for him.

The thought sought to be conveyed in the first paragraph probably was that, though the purchaser may suppose the seller the owner, this will not obviate the application of the doctrine of ostensible authority; but, if so, the court was not happy in its expression, for the language employed in effect advises the jury that one purchasing property in good faith from a person intrusted therewith will acquire a good title as though he had dealt with the owner. Such is not the law, and the error is not obviated by what follows.

The court told the jury in the second instruction, that "the statements or declarations of said Willard that he was such agent and had such authority to sell, or that he owned such buggy, or had an interest therein, if any such statements or declarations were made, are not alone competent to establish, and do not establish, such agency or authority." From insertion of the word "alone," the jury might have inferred that such declarations could be considered in connection with other evidence in determining agency on the part of Willard. For that purpose, declarations of the agent are not to be considered by the jury. *Hinkson v. Morrison*, 47 Iowa, 167.—*Reversed*.

6. SAME:  
authority of  
agent:  
evidence.

WALTER E. SCOTT, Appellant, v. T. M. L. WILSON, Appellee.

**Contracts:** PAROL EVIDENCE: ADMISSIBILITY. In this action to recover money paid on a written contract under an alleged mutual mistake, the plaintiff, having offered oral evidence of communications between the parties leading up to a written modification of the original contract, could not object to like evidence by defendant in response to that offered by him. Besides evidence of the acts and communications of the parties after the execution of the modification of the contract was admissible, in so far as it bore on the performance of the agreement, or tended to show the construction placed upon it by the parties.

**Same:** CONSTRUCTION: SALE OF REAL PROPERTY: PAYMENT OF ASSESSMENTS. The parties to this action entered into a contract for the sale of land which provided for final payment of the purchase price on a certain date, that defendant should then show good title, and further that the purchaser should pay all taxes and assessments as they became due. The abstract disclosed an assessment for drainage purposes at the date of the contract in a certain sum, and a supplemental contract was made authorizing plaintiff to retain from the final payment of the land a sum equal to the assessment. After the date for final payment further drainage proceedings were had resulting in a much larger assessment against the land. *Held*, that the contract should be construed as applying to the date of final payment for the land and not as embracing subsequent assessments, and that plaintiff was not entitled to recover the difference from defendant on the theory of mistake.

**Instructions:** PREJUDICE. Where the defendant was entitled to a verdict in any event an error in the instructions was not prejudicial to plaintiff.

*Appeal from Dallas District Court.*—HON. W. H. FAHEY, Judge.

THURSDAY, OCTOBER 24, 1912.

ACTION at law to recover back money paid by mutual

mistake under the provisions of a written contract. There was a verdict and judgment for the defendant. Plaintiff appeals.—*Affirmed.*

*Burton & Russel*, for appellant.

*White & Clark*, for appellee.

EVANS, J.—The action was before us upon a former appeal. *Scott v. Wilson*, 150 Iowa 202. On that appeal, however, only the sufficiency of the allegations of the petition was involved; the case being tried as on a demurrer to the petition. After remand of the case, plaintiff filed a substituted petition, and upon issue made the case went to trial. The undisputed facts appearing in the present record differ so materially from those presented by the former record that we can not say that our opinion on the former appeal controls the result on this appeal, as will appear in our later discussion.

On November 18, 1908, the plaintiff bought of the defendant an eighty-acre farm for an agreed consideration of \$4,200. A written contract was entered into, known in the record as "Exhibit A." Such contract contained the following provisions:

And the said party of the second part in consideration of the premises hereby agrees and with the party of the first part to purchase all his right, title and interest in and to the real estate above described, for the sum of forty-two hundred and no-100 dollars and to pay said sum therefor to the party of the first part, his heirs or assigns, as follows: One hundred and no-100 dollars on the execution of the agreement, and the balance of ——— dollars as follows, to wit: Nine hundred dollars when warranty deed to said land and abstract of title thereto showing a clear and perfect record title to said land is delivered to First National Bank, Adel, Iowa, in escrow for delivery to the party of the second part, March 1, 1909. Thirty-two hundred dollars March 1, 1909, when said abstract and

deed are delivered to said second party, with interest from March 1, 1909, at the rate of six percent per annum on all such sums as shall remain unpaid, payable annually, till all is paid. And party of the second part shall also annually pay all taxes and assessments that may accrue on said property as they become due or before they become delinquent, not including the taxes for the year 1908, which party of the first part is to pay.

At the time this contract was entered into, it appears without dispute that certain proceedings to establish a drainage district had been commenced, including this land. No work had been done upon the proposed improvement; but the commissioner had filed his report, together with an estimate of benefits to be assessed, including approximately \$500, against Wilson's land; and such assessment had been entered upon the records against Wilson and his land. This assessment was made to appear upon Wilson's abstract as an incumbrance when the abstract was delivered to Scott in pursuance of the contract. A dispute arose over the construction of the contract, and this resulted in another contract, known in the record as "Exhibit B," which was entered into December 2, 1908, and was as follows:

Whereas a controversy has this day arose between the parties to the within contract as to which of said parties shall pay the tax and costs of construction of ditch No. Six (6), Washington township, Dallas county, Iowa, and assessed and to be assessed and levied on the south half of the southeast quarter ( $\frac{1}{4}$ ) of section 17—80—28 in said county described on the within. It is hereby agreed by and between said parties that said second party shall retain in his hands out of his payment of March 1, 1909, an amount of money sufficient to pay the amount of taxes assessed and levied on said land for said drainage purposes, and said sum deposited in the First National Bank at Adel, Iowa, the amount so retained to pay such taxes when due and payable, and if the court shall finally determine said land is not liable for said costs and taxes, said sum of money so retained for said purpose by said party shall be paid to said first party, on the order of the first party

therefor. This memorandum of agreement is made as additional to a certain written contract between said parties named herein, dated November 18, 1908, and made a part hereof.

In February, 1909, a slight addition was made to the assessment against the land, leaving it still within \$500. Such was the condition of the record on March 1, 1909, on which date the plaintiff accepted the abstract of title and a warranty deed and remitted to Wilson the balance of the purchase money, less \$500. By subsequent proceedings, the exact nature of which do not very clearly appear, an assessment of \$1,292 was made against the land and against plaintiff, Scott, as the owner thereof. The plaintiff sues to recover of the defendant the difference between such sum and the sum of \$500 already retained. The parties having acted upon the contract, Exhibit B, and, the plaintiff having remitted to defendant the sum of \$2,700 as a balance due, he sues to recover back \$800 thereof as having been paid by mutual mistake. The contention of defendant is that by the contract, Exhibit B, he only undertook to pay the proposed assessment then appearing upon the record against the land, and that both parties so construed the contract and acted upon such construction. He contends, also, that the alleged mutual mistake, if any, under which plaintiff claims to have paid the final payment existed at the time the contract, Exhibit B, was entered into. The mutual mistake consisted of the mutual belief of both parties that the assessment was approximately \$500. This was the belief of the parties when the contract was entered into, and the defendant contends that he would not have entered into the contract except upon such understanding.

I. Considerable oral evidence was received by the trial court over the objection of the plaintiff. We need not deal with these objections in detail. The substituted petition of the plaintiff set up his cause of action in four counts.



One of these pleaded the contract as oral. All of them pleaded the contract as partly written and partly oral. In support of his petition, the plaintiff introduced oral evidence of all the negotiations between the parties leading up to the contract, Exhibit B. The defendant introduced considerable testimony of like character without objection. At a later stage of defendant's evidence, plaintiff began to interpose objections to the competency of the evidence. It is sufficient to say that the evidence thus objected to was responsive to the oral evidence introduced by plaintiff, and he was thereby precluded from objecting thereto.

It is also true that the provisions of the written contract are such that some intrinsic facts were necessary to be shown, in order to enable the court to construe the contract and to apply the same. The line was not very closely drawn between the evidence of such facts and the evidence of oral negotiations leading up to the contract but this line had been lost long before the plaintiff made his objections, and before he had closed his own case. It is to be noted, further, that what was said and done by the parties after the execution of the contract, Exhibit B, was clearly competent, so far as it bore upon the performance of the contract and upon the construction which the parties put upon it. Upon the record before us, we must hold, therefore, that the appellant has no grievance because of the admission of oral evidence.

II. Before proceeding to other features of the case, we may as well construe the written contracts of the parties as applied to the undisputed facts existing at the time they were made. In the record before us on the former appeal, it was made to appear that at the time Exhibit B was entered into, no assessment had been then made, and that none had been made on March 1st, when the plaintiff paid the balance due. This feature of the case was emphasized

1. CONTRACTS:

parol evidence:  
admissibility.

2. SAME: con-

struction: sale  
of real prop-  
erty: payment  
of assessments.

in the opinion in construing Exhibit B. If no assessment had been made at that time, the contract must necessarily be held to refer to a future assessment and not a present one, although the terms of the contract indicate a present tense. It is the undisputed showing on this record that a present assessment did appear against the land. Whether valid or not, it appeared as an assessment upon the record, and was entered upon defendant's abstract as an incumbrance. We must now construe Exhibit B in the light of this fact, and as applicable thereto.

It is to be noted that Exhibit A contained this provision: "And party of the second part, Scott, shall also annually pay all taxes and assessments that may accrue on said property as they become due or before they become delinquent, not including the taxes for the year 1908, which party of the first part is to pay."

The contract, Exhibit A, also provided that the defendant should furnish an abstract "showing a clear and perfect record title." These two provisions furnished the occasion for the dispute between the parties. Whether they were in conflict or not depends upon the construction to be put upon the contract. Whether the mere pendency of drainage proceedings, without more, would constitute a breach of a contract for a perfect title, we need not consider. But a purported assessment having been actually entered upon the record created at least a cloud, and this furnished the occasion for controversy in good faith. Although the contract, Exhibit A, provided that the second party should pay all taxes and assessments except the taxes of 1908, the term "assessment" could fairly be construed as referring to future assessments and not to existing ones, in view of the provision that the first party was to furnish a perfect title on March 1, 1909. Under this construction the defendant would be liable for assessments actually then made, and the plaintiff for assessments to be made in the future.

Turning now to Exhibit B, its preamble recognizes

a distinction between taxes "assessed" and those "to be assessed." The undertaking of the defendant, however, is confined in terms to the taxes "assessed." There are three possible constructions to this part of the contract, which may be indicated by the interpolation of bracketed words as follows:

(1) "It is hereby agreed by and between said parties that said second party shall retain in his hands out of his payment of March 1, 1909, an amount of money sufficient to pay the amount of taxes [now] assessed and levied on said land for said drainage purposes." (2) "It is hereby agreed by and between said parties that said second party shall retain in his hands out of his payment of March 1, 1909, an amount of money sufficient to pay the amount of taxes [then] assessed," etc. (3) "It is hereby agreed by and between said parties that said second party shall retain in his hands out of his payment of March 1, 1909, an amount of money sufficient to pay the amount of taxes [to be at any time hereafter] assessed and levied," etc.

The plaintiff contends for the third construction above indicated. If the first or second be adopted, the plaintiff can not recover. Inasmuch as there was a tax "assessed" at the time the contract was entered into, the natural import of the terms used would readily apply to such a tax alone, were it not for the fact that the defendant was to furnish a clear title on March 1st. This latter provision of the contract would invite the second construction. As between the first and second, we need not determine, because the result must be the same in either case. Inasmuch as there was an existing assessment, and inasmuch as the defendant was able to furnish a clear record title on March 1st by the payment of \$500, we would not be justified in adopting the third construction above indicated. This view renders Exhibit B consistent with Exhibit A. It was intended as an agreed interpretation of Exhibit A. The plaintiff himself put this construction upon it. Such con-

struction is also equitable whereas the other construction is grossly inequitable. The construction of the improvement had not been begun when the contract of sale was entered into. None of the benefits of the improvement ever accrued to the defendant. The large assessment subsequently made was wholly for benefits accrued to this land since the sale. These were assessed to the plaintiff Scott as the owner thereof, and such benefits accrued to him alone.

It will be noted, also, from the terms of Exhibit B that it was provided that "if the court shall finally determine said land is not liable for said costs and taxes, said sum of money so retained for said purpose by said party shall be paid to said first party." This was the only contingency provided for in express terms.

The claim of mutual mistake is not available to plaintiff. The alleged mutual mistake was the mistaken belief of both parties. If the plaintiff acted upon it in paying the balance of the purchase price, the defendant also acted upon it in entering into the contract, Exhibit B. If the plaintiff is entitled to relief on account of such mistake, the defendant would be likewise entitled to relief for the same mistake. If the construction contended for by plaintiff should be adopted, then the defendant through the same mutual mistake incurred an obligation which he never dreamed of, and which he would not have incurred consciously. If both parties should be relieved from the consequences of such mutual mistake, it would eliminate Exhibit B, and the rights of the parties would have to be determined under the express provisions of Exhibit A.

Construing Exhibit A alone, it is clear that the plaintiff has had all that he is entitled to. We reach the conclusion, therefore, that upon the undisputed facts the defendant was entitled to a verdict, and the trial court could properly have so directed.

III. Considerable argument has been directed by ap-

pellant against certain instructions of the trial court numbered 5, 6, and 7. In view of our conclusions announced in the foregoing paragraph, we have  
3. INSTRUCTIONS: no need to deal further with specific excep-  
prejudice. tions. Perhaps we ought to say, however, that the exceptions to the noted instructions are well taken. Instruction 5 advised the jury that the terms of the contract, Exhibit B, taken in their ordinary and usual import, obligated the defendant to pay all the taxes which had been or should be levied. But it submitted to the jury to say whether the parties intended "that said contract should have different and other effect than the effect which the language employed would usually and ordinarily have." This proposition was amplified to some extent in the other instructions. It was clearly erroneous. But, inasmuch as the defendant was entitled to a verdict in any event, the error in the instructions can not be deemed prejudicial.

The judgment below must therefore be—*Affirmed*.

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IOWA MOLYNEUX, Relator, v. K. E. WILCOCKSON, Judge,  
Respondent.

**Criminal law: HUSBAND AND WIFE: COMPETENCY AS WITNESSES AGAINST EACH OTHER.** The forging of a wife's signature by her husband to an obligation for the payment of money is not a crime against the wife, which will permit her to testify against her husband on his prosecution, either under the common law or the statute, but the crime is against the person induced to accept the fraudulent instrument; and the wife is not subject to punishment for contempt for refusal to so testify.

*Certiorari from Mahaska District Court.*—HON. K. E. WILCOCKSON, Judge.

THURSDAY, OCTOBER 24, 1912.

THIS proceeding by certiorari is brought to review the action of the trial court in committing the plaintiff for contempt in refusing to answer certain questions propounded to her as a witness before the grand jury, in a prosecution of her husband for the crime of forgery.—*Annulled.*

*Stockman & Baker, and J. A. Devitt, for relator.*

*Frank M. Beatty, for respondent.*

McCLAIN, C. J.—Before the grand jury investigating a charge against J. I. Molyneux for the crime of forgery, his wife, the relator, was shown certain written instruments purporting to be signed by herself and husband, and was asked whether she signed her name to such exhibits, and whether she authorized her husband to sign her name to any or all of them and each of these questions she refused to answer. Thereupon the grand jury appeared in open court and made a statement that the questions related to the crime of forgery, charged to have been committed by the husband of the witness, and the court, after hearing the reasons assigned by the witness for her refusal to answer, directed that she should answer, and upon her persistent refusal to do so ordered her to be committed for contempt. It is the legality of this action of the court which is questioned in this proceeding by certiorari.

The provision of the Code relied upon by plaintiff as an excuse for refusing to answer the questions propounded to her is as follows:

Sec. 4606. Neither the husband nor wife shall in any case be a witness against the other, except in a criminal prosecution for a crime committed one against the other, or in a civil action or proceeding one against the other, or in a civil action by one against a third party for alienating the affections of the other, but in all civil and criminal cases they may be witnesses for each other.

It is conceded, of course, that this section furnishes a complete excuse for the refusal to answer, unless the crime charged against the husband in the prosecution before the grand jury was a crime committed by him against his wife. With reference to this matter, it appears that the charge was of forging the name of his wife to instruments importing a joint liability of both.

The question is therefore whether the forgery of the wife's name to an instrument purporting to impose upon her a pecuniary obligation is a crime against her, within the provision of the statute above quoted. In this connection it must be borne in mind that forgery is a crime involving an intent to defraud. See Code, sections 4853, 4854; *State v. Sherwood*, 90 Iowa, 550.

The fraud involved consists in the intent to injure the person who may be induced to accept as valid an instrument which is without legal validity. The natural effect of the forgery of the wife's name to the instrument would not be to render her liable thereon, for no liability of the wife would thus be created, but to defraud a person who was induced to accept it, relying upon the genuineness of her signature. We think that it is quite evident, therefore, in the nature of things, that the crime charged against the husband was not committed by him against his wife, but rather one committed by him against the person to whom the forged instruments were delivered, or intended to be delivered, to his injury.

The authorities on the general question as to what is a crime against the wife by the husband, such as to remove the bar to her testifying against him as a witness, are not entirely harmonious. In the first place, it may be stated that, according to the general weight of authority, such a statutory exception embodies merely an exception which was recognized at common law; and therefore the general current of decisions with reference to the right of the wife to testify against the husband may be considered. *Bassett*

*v. United States*, 137 U. S. 496 (11 Sup. Ct. 165, 34 L. Ed. 762); *State v. Kniffen*, 44 Wash. 485 (87 Pac. 837, 120 Am. St. Rep. 1009, 12 Ann. Cas. 113). But, to the contrary, see *Hills v. State*, 61 Neb. 589 (85 N. W. 836, 57 L. R. A. 155). Now it seems to be generally conceded that a prosecution for personal violence committed by the husband upon the wife is a prosecution for a crime against the wife. *Dill v. People*, 19 Colo. 469 (36 Pac. 229, 41 Am. St. Rep. 254); and in the application of this general principle it has been held that a charge of conspiracy to have a wife declared insane involves a crime against the wife, such as to render her a competent witness against her husband—the theory being that a finding of her insanity would necessarily involve bodily violence, injury, or restraint. *Commonwealth v. Spink*, 137 Pa. 255 (20 Atl. 680). And it has also been held that on the charge of perjury in making a false affidavit, for the purpose of securing apparent jurisdiction over the wife in a suit for divorce against her, she was a competent witness against her husband; she being the particular person who would be injured in her personal rights as the result of such crime. *Dill v. People*, *supra*. In this case it was suggested that a libel against the wife by the husband would be a crime against her.

This court has gone further than some others in holding that the crime of incest committed by the husband is a crime against the wife, such as to render her a competent witness. *State v. Chambers*, 87 Iowa, 1. And so it is said that in a prosecution against the one for adultery or bigamy the other is a competent witness. *State v. Bennett*, 31 Iowa, 24; *State v. Sloan*, 55 Iowa, 217. This general conclusion seems to be in conflict with the views expressed in *Bassett v. United States*, *supra*, as to the common-law rule. And see notes to *State v. Kniffen*, *supra*, in 12 Ann. Cas. 113.

We have no inclination to abandon the position al-



ready taken with reference to crimes which may be said to be against the marital relation; nor do we feel now called upon to say that crimes committed by the husband involving direct injury to the wife's property are not crimes against the wife though there is some authority to that effect. See as to arson, *State v. Kephart*, 56 Wash. 561 (106 Pac. 165, 26 L. R. A. (N. S.) 1123), and, as to larceny, *Overton v. State*, 43 Tex. 616.

But whether we regard our statutory exception as embodying only the exception recognized at common law, or, on the other hand, as enlarging the common-law exception, we would not be justified by any authority called to our attention in holding that the forging by the husband of the wife's signature to an obligation for the payment of money was a crime against the wife.

The order of the lower court was therefore wholly without authority; and it is—*Annulled*.

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CHAS E. ANDREAS, Appellee, v. JOAB HINSON, Appellant.

**Slander per se:** SENSE IN WHICH WORDS WERE USED: EVIDENCE. In  
1 this action for slander the question of whether the words, slanderous *per se*, were used in a slanderous sense or only in a vituperative sense and were so understood by the hearers was for the jury.

**Same:** PRESUMPTION. The presumption is that language slanderous  
2 *per se* was used and understood by the hearers in its ordinary sense, and the burden is upon the defendant to show that it was used and understood in a different sense; and in passing on this question the whole evidence must be considered: So that any error in refusing to direct a verdict for defendant at the close of plaintiff's evidence is not available to defendant, where he subsequently offered evidence curing the defects in plaintiff's case.

**Same:** EVIDENCE: PREJUDICE. The sustaining of an objection to a  
3 question which had been previously fully answered was not prejudicial.

**Same: EVIDENCE: MALICE: MITIGATION.** In an action for slander  
4 the same evidence which tends to show malice may also be  
considered in mitigation of damages.

**Same.** Malice is implied from the use of words slanderous  
5 *per se*.

**Same: DAMAGES: EXCESSIVE VERDICT.** Where the words used were  
6 actionable *per se*, actual damages may be awarded without  
formal proof of the amount; and where the amount of verdict  
did not indicate passion and prejudice it will not be disturbed.

*Appeal from Des Moines District Court.*—HON. W. S.  
WITHROW, Judge.

THURSDAY, OCTOBER 24, 1912.

**ACTION** for slander. There was a verdict for the  
plaintiff for \$300 and judgment entered thereon. Defend-  
ant appeals.—*Affirmed.*

*C. H. Mohland, and Poor & Poor, for appellant.*

*Tracy & Tracy, for appellee.*

EVANS, J.—The slanderous words charged were, “You  
are a son of a bitch and a thief.” It is charged that these  
words were uttered by defendant to the plaintiff in the  
presence of other persons. The contention of  
the defendant is that he uttered such words,  
not in a slanderous sense, but in a vituperative  
sense only, and in the heat of anger;  
that he did not intend to impute any crime to the plaintiff;  
and that his words were understood by the hearers as not  
imputing any crime. The trial court instructed the jury  
that if the words were used only in a vituperative sense, and  
were only so understood by the hearers, that the use of  
the word “thief” in such sense was not actionable as  
slanderous. The defendant contends that under such a

1. SLANDER *per se*: sense in which words were used: evidence.

statement of the law there should have been a directed verdict in his favor. There is much in the record in support of the contention of the defendant. There was an altercation of words between the parties at the home of the defendant's son. The plaintiff was a comparative stranger both to defendant and his son. He had come there with Louis Dravis, who was a brother of Mrs. Dick Hinson, the daughter-in-law of the defendant. There appears to have been some estrangement between the Dravis and Hinson families, and Mrs. Dick Hinson had been either dissuaded or prevented from visiting her people. The plaintiff and Louis Dravis had come to invite Mrs. Dick Hinson to see her father, who was then ill. They came in a buggy, and offered to take her there and bring her back. The record indicates that there was some urging on their part, notwithstanding the objections of her husband, Dick Hinson. This was construed by the defendant, Joab Hinson as an attempt to steal his son's wife. This is his explanation of the use of the language charged. The instructions were such that the jury could well have found for the defendant on this contention.

Nevertheless the language used was slanderous *per se*. The plaintiff was entitled to the presumption that it was used and understood in its ordinary sense. The burden

2. SAME:                was upon the defendant to show that it was  
presumption.        used and understood in a different sense.

Some of the persons who were present at the altercation testified to their understanding of the meaning intended by the defendant. Others did not testify. We can not say that the evidence is conclusive in defendant's favor at this point. His own testimony was such as to weaken the theory of his counsel and to leave the question as one fairly for the jury. Upon the whole record, therefore, we think the defendant was not entitled to a directed verdict. And this is so even though the defendant might have been entitled to a directed verdict at

the close of plaintiff's evidence. Even if the court erroneously overruled defendant's motion at that time, it will not now avail the defendant. Inasmuch as defendant proceeded with his evidence, such evidence became a part of the record. If it cured defects in plaintiff's evidence, it saved plaintiff the necessity of curing them himself. In passing upon the sufficiency of the evidence, we must look to the whole record as finally made.

II. The actionable words were charged to have been uttered on March 24, 1911, on a particular occasion. The plaintiff introduced the testimony of one Stapleton as to a conversation had between him and the defendant a few days after the 24th of March. This witness testified as to certain declarations or admissions of the defendant, as follows: "He said he told Andreas what he thought of him. I believe he said he was a damn thief, or something to that effect." On cross-examination the following appeared: "Q. What did you understand that he referred to when he said he told him what he thought of him? A. I didn't know. I supposed that he didn't want him around there. I don't know whether it was on account of being after Dick's wife. Q. *When he speaks of having said that he was a thief, what did he refer to then, as you understood?* (Objected to as incompetent, irrelevant, and immaterial, and asking for an opinion.)" The objection was sustained, and complaint is made of this ruling. It is sufficient to say that the question objected to was a mere repetition of the previous question. Such previous question was fully answered. Defendant was not prejudiced by a failure to obtain such answer a second time.

III. Complaint is made of the last part of the fifteenth instruction, which is as follows: "And if you find that the defendant at the time acted with malice against the plaintiff, you may then allow such further amount as you may deem proper by way of vindictive damages, or

3. SAME: evidence: prejudice.

damages by way of punishment." Appellant does not contend that this is not a correct statement of the law in the abstract. His argument is that he had pleaded in mitigation the fact that he had spoken the words in anger, under provocation, and that there was no evidence of malice, except such anger and opprobrious epithets used. It is argued, in substance, that the same evidence could not be considered by the jury as evidence of malice and also as evidence in mitigation of damages. We can not sustain this contention. Anger may indicate malice and yet may properly be regarded in mitigation. There are degrees of malice and the same evidence which shows malice may show it also in reduced degree.

The charge made against the plaintiff was slanderous *per se*, and malice was therefore implied. The plaintiff was not for that reason precluded from proving malice in fact. For that purpose, he had a right to submit to the consideration of the jury the entire conduct and mental attitude of the defendant at the time of the publication of the slanderous words.

IV. It is urged that the verdict was excessive, and that only nominal damages should have been allowed. The verdict was \$300. The amount of the verdict does not indicate any passion or prejudice. The jury having found that the slanderous word was used by the defendant in an actionable sense, actual damages were implied, without any formal proof as to the amount thereof. It is not true in such a case that only nominal damages can be allowed. The amount of damages in such a case is peculiarly within the discretion of the jury. *McDonald v. Nugent*, 122 Iowa, 655; *Davis v. Mohn*, 145 Iowa, 417; *Tathwell v. City*, 122 Iowa, 54; *Morse v. Printing Co.*, 124 Iowa, 708; *Reizenstein v. Clark*, 104 Iowa, 287.

We find no ground upon which we can properly inter-

fere with the verdict. The judgment of the lower court must therefore be—*Affirmed*.

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J. A. RUAN, Appellant, v. MAHASKA COUNTY.

**Public health: CONTAGIOUS DISEASE: RECOVERY FOR SUPPLIES: STATUTE.**

1 The statute providing that a written order from the local board of health, designating the person employed to furnish supplies or services to anyone afflicted with a contagious disease, shall be issued before the services or supplies are furnished, and shall be attached to the bill when presented for payment is mandatory, a failure to procure which will defeat recovery.

**Same: CERTIFICATION OF BILL FOR SUPPLIES.** The signing of their  
2 names by the township trustees on the back of a bill for services or supplies, furnished a person afflicted with a contagious disease, is not a certification of the same to the board of supervisors as is required by statute.

*Appeal from Mahaska District Court.*—HON. JOHN F. TALBOT, Judge.

THURSDAY, OCTOBER 24, 1912.

THE facts are stated in the opinion.—*Affirmed*.

*Dan Davis and McCoy & McCoy*, for appellant.

*J. G. Patterson*, for appellee.

SHERWIN, J.—The appellant was the duly appointed general health physician of the township of Garfield, appointed by the township trustees about the 1st of April, 1911. On the 8th day of April, 1911, he was directed by Wilford Hull, chairman of the board of trustees, to attend a family that was afflicted with diphtheria. He did render professional service to said family by virtue of said direction, and duly presented his bill for such service to

the township trustees, who allowed the same, and it was thereafter presented to the board of supervisors of the county for payment. It was not allowed by the board of supervisors, and thereafter suit was brought to enforce payment of the same. Trial was had in the district court upon the agreed statement of facts, and judgment rendered against the appellant. There is no controversy over the amount that should be paid, if the county is liable at all. The facts are that at the time of the employment of the appellant by Mr. Hull the township trustees had held no meeting at which it was determined that the family in question should be quarantined, or that it was a proper subject for public assistance, and, as we understand the record, there never was a quarantine. No written order authorizing the appellant to furnish such service was issued until after the service had been rendered. The only approval and certification of appellant's bill by the township trustees was by signing their names on the back thereof, accompanied by the oath of the township clerk that the same was just and true and wholly unpaid.

Chapter 156, Acts of the 33d G. A., repealed several sections of the Supplement to the Code of 1907, and among other provisions enacted the following: "All bills for supplies furnished and services rendered by order of the mayor or township clerk as herein provided, . . . or for persons financially unable to provide for their sustenance and care, shall be allowed and paid for only" on a certain basis therein specified. And then it is provided that "all services and supplies furnished to individuals or families under the provisions of this section must be authorized by the local board of health, or by the mayor or township clerk acting under standing regulations of such local board, and a written order therefor designating the person or persons employed to furnish such service or supplies, issued before said service or supplies

1. PUBLIC  
HEALTH: con-  
tagious disease:  
recovery for  
supplies:  
statute.

were actually furnished, shall be attached to the bill when the same is presented for audit and payment." It is further provided in said chapter: "All bills and expenses incurred in carrying out the provisions of this section . . . shall be filed with the clerk of the local board of health. This board at its next regular meeting or special meeting called for the purpose, shall examine and audit the same and, if found correct, approve and certify the same to the county board of supervisors for payment." It is very evident that the requirement that a written order for the performance of the service, issued before said services are actually furnished, is a mandatory requirement placed in the law for the protection of the public funds. It is a new provision in the law, clearly put there for a purpose. Were we to construe it as the appellant contends it should be construed—that is, that the order may be issued at any time—so long as it is finally filed with the county, we would have to annul the section by disregarding plain and unambiguous language, and this we have no authority to do. It is a simple requirement which can easily be complied with, if the proper officers pay any attention to the requirements of the law in these cases. No reason is shown why it could not have been complied with in this case, and we are of the opinion that the trial court correctly held that there was such a disregard of the statute in this respect as to defeat recovery.

Nor was the mere signing of their names by the trustees on the back of the bill a certification of the same to the board of supervisors.

2. SAME: certification of bill for supplies.

*Mansfield v. Sac County*, 60 Iowa, 11; *Sloan v. Webster County*, 61 Iowa, 738.

Other reasons why the judgment of the district court should be affirmed are given by the appellee, but, in view of our conclusion on the points discussed herein, we need not determine the other question. The judgment is—  
*Affirmed.*



J. W. BRUNK, BERTHA WRAY and EFFA MILLIGAN, v. BARNEY B. BRUNK, Administrator et al., and ELIZABETH BRUNK, Intervener, Appellants.

**Wills: CONSTRUCTION: ESTATE FOR LIFE.** A devise of real and personal  
1 property to the wife while she remained testator's widow was in effect a devise to the widow for life or during her widowhood, and conferred upon her no estate of inheritance. And a further provision that she should take charge of everything and use it to the best of her knowledge and ability, without bond or security, did not have the effect to render the estate one in fee simple.

**Same.** The subsequent provisions of the will devising a life estate  
2 to the widow, that in case she should remarry she should have one-third of the property and the balance should be divided among certain children, she to have the use of the estate prior to remarriage, did not give her an absolute power of sale but simply the right to take and use the property, which was consistent with the life estate granted, and did not convert it into a fee simple on the theory that there may not have been any property left at her remarriage to be divided.

**Costs: APPORTIONMENT.** Parties unsuccessfully resisting an appli-  
3 cation to set aside the sale of an administrator and for his removal, can not complain of an apportionment of the costs and the taxation of a portion against them.

*Appeal from Davis District Court.*—HON. M. A. ROBERTS, Judge.

THURSDAY, OCTOBER 24, 1912.

IN a probate proceeding to set aside an order previously made for the sale of real estate and for the removal of the administrator, the widow of decedent intervened, claiming to be the owner in fee simple of the real estate, the sale of which had been ordered by the court, and asking that the

will of her husband, Salem Brunk, the decedent, be construed and her rights thereunder be determined and fixed. There was a decree setting aside the order of sale, discharging the administrator, and ordering a sale of only so much of the property as should be found necessary to satisfy the debts of the estate and taxing a portion of the costs of the proceeding to the defendants and the intervener. The intervener appeals from the decree so far as it determines her rights in the estate, and the defendants appeal from the provision of the decree taxing to them a part of the costs. —*Affirmed.*

*John F. Scarborough*, for appellants.

*Taylor & Ramseyer*, for appellees.

MOCLAIN, C. J.—For the disposal of the questions raised on this appeal, the following facts only seem to be material: In 1905, Salem Brunk executed his last will in the following terms:

First. I will all of my real estate and personal property to my wife Elizabeth Brunk, while she remains my widow.

Second. If she should fail to be my widow during her lifetime, she is to have one-third of all my real estate and personal property and the balance is to be divided equally between my children, with the exception of the following: My eldest son, J. W. Brunk, is to pay the other heirs out of his part for property received when he was married in his 21st year, four hundred dollars (\$400.00) and for property and surety debts for him since \$250.00, total \$650.00. And my second son John H. Brunk is to pay out of his part \$110.00, and my third son Ira Brunk, is to pay one thousand and three hundred dollars for furniture store I furnished him with in the year 1901 and on other property and security debts. Total \$1,300. My wife is to take charge of everything and use to the best of her knowledge without any bond and security, and that all that

is left at her second marriage or death is to be divided as stated above if there is that much left, and if the property should decrease in the proportionment.

This will, on the death of the testator, was duly probated. On intervener's application for a construction of the will, the court held that, not having married, she was entitled to a life estate only in the land described in the will. Her contention is that she became the fee-simple owner, or, if not the owner in fee simple, that she had, in addition to a life estate, an absolute power of disposal of the property.

L. The first paragraph plainly amounts to a devise for life subject to a condition with reference to marriage. As she has not married, she has only a life estate unless the provisions of the second paragraph are to be so construed as to indicate an intention on the part of the testator that his widow shall take the property absolutely. The language of the first paragraph is not broader in its effect than a devise to the widow for life or during widowhood. She could not remain his widow after her death, and the devise therefore conferred upon her no estate which could pass by inheritance.

The contention for the widow is, however, that the provisions in the latter portion of the second paragraph show the intention of the testator to have been that she was to have such absolute power of disposal as would preclude any interest of the heirs in the property, and therefore would render the estate in effect one in fee simple. But we think the language used can not be given any such construction. The widow is authorized "to take charge of everything and use to the best of her knowledge without any bond and security." Evidently the power to take charge of and use the property is consistent with a life estate and inconsistent with an estate in fee simple, in view of preceding provisions of paragraph 2, which

2. WILLS: construction:  
estate for life.

plainly contemplate a distribution of the property among the testator's heirs after the marriage or death of the widow.

The cases of *Paxton v. Paxton*, 141 Iowa, 96, and *Hamilton v. Hamilton*, 149 Iowa, 321, especially relied upon by counsel for appellants, are plainly not in point. In both of these cases, it is conceded that even the expressed or implied addition of a power of disposal to a life estate does not show an intention to create an estate in fee simple, unless such power of disposal is so absolute and unlimited as to preclude any limitations of the interest of the devisee dependent upon the continuance of his or her life. Plainly, in this case, power of disposal absolutely without limitation or condition is not conferred, but only a power to take and use which is consistent with, rather than repugnant to, a grant for life.

II. The only language in the second paragraph suggesting a power of disposal in addition to a life estate is that which implies inferentially, as it is contended, that there may not be any property left on the second marriage or death of the widow to be divided as contemplated in the first portion of the second paragraph. This language would be persuasive if added to a provision authorizing sale of the property by the widow; but no such provision is to be found in any portion of the will. It must be conceded that the language is ambiguous but mere ambiguity in itself is not sufficient to convert what would otherwise be plainly the devise of a life estate into a devise in fee simple. It may be that, if the widow had remarried and taken one-third of the real estate remaining undisposed of at the time of the testator's death, the balance would not have been sufficient to enable the sons named in the second paragraph to pay to the other heirs out of their portions the sums required to be paid by them, and that testator intended some readjustment of the interest of the heirs in view of such contingency. However, this may

2. SAME.

be, we are satisfied that the will does not confer upon the widow any power in addition to that of taking charge of the property and using it; such power being consistent with and not in addition to that involved in the devise to her of a life estate. We think, therefore, that the court did not err in limiting the widow's interest to one for life, without any other right in the property than that conferred upon her by the devise of such interest.

The complaint as to taxation of a portion of the costs to the defendants is not well founded. Plaintiffs sought to have set aside a previous order of the court directing the sale of the entire property and the removal of the administrator. The defendants resisted the granting of this relief and were unsuccessful. We see no reason why they should not pay a portion of the costs, and there is nothing in the record to indicate that the apportionment was unreasonable.

3. Costs: apportionment.

The decree of the trial court is—*Affirmed.*

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IDA SWISHER, Appellant, v. ESTHER M. SWISHER, et al.  
and the CITIZENS SAVINGS BANK and FIRST NATIONAL  
BANK OF IOWA CITY, Interveners, Appellees.

**Trusts: EQUITABLE CONVERSION.** A conveyance of property in trust  
1 for specified purposes with no imperative direction that the  
trustees shall sell the same, though containing simple authority  
to sell, will not effect an equitable conversion of the real prop-  
erty into personalty.

**Same: TRUST DEEDS: GRANTEE AS BENEFICIARY: EFFECT.** A person  
2 can not hold the legal title to real property in trust for his  
own benefit: So that a trust deed naming one of the grantees  
as a beneficiary vests in him the entire title to his undivided  
interest or share in the property.

**Exemptions: BURIAL LOT: EXTENT OF EXEMPTION.** Under the statutes  
3 there is exempt to the head of a family his interest in a public  
or private burying ground, and upon his death the same con-  
tinues exempt to the family from liability for his debts.

**Same: HOMESTEAD: EXTENT OF EXEMPTION.** The homestead of every  
4 family, whether owned by the husband or wife, is exempt from execution and sale, except where there is an express statutory provision otherwise; and this exemption is for the benefit of every member of the family.

**Same: DEVISE OF HOMESTEAD: EXEMPTION.** The acceptance of a  
5 devise of the homestead by the surviving spouse will not destroy its exempt character in the hands of such devisee; and it is not subject to the general debts of the testator, but only such as are specially provided for by statute. The only instance in which general creditors may resort to the homestead of a deceased person is when he left no spouse and no issue.

*Appeal from Johnson District Court.*—HON. R. P. HOWELL,  
Judge.

FRIDAY, OCTOBER 25, 1912.

THE opinion states the case.—*Affirmed* in part; *Reversed* in part.

*Ball & Ball*, for appellant.

*O. A. Byington*, and *Ranck & Bradley*, for appellees.

WEAVER, J.—A. E. Swisher of Iowa City, died testate August 29, 1909, survived by his wife, Ida F. Swisher, and several minor children. By the terms of his will, after bequests to his children, to be paid from proceeds of life insurance, the testator provides for his wife as follows:

(5) I will and devise to my wife, Ida F. Swisher, all the balance and remainder of the proceeds of life insurance on my life, including accident insurance. I also will and devise to my wife, Ida F. Swisher, absolute, my homestead where I now reside, being the northeast one-fourth of out lot one in Iowa City, Iowa. Also all books, pictures, furniture and household goods, in said house and home at the time of my death. I also devise to my said wife, horse, carriages and contents of the barn on said

homestead. I also will and devise to my wife, Ida F. Swisher, all the remainder of my estate of every kind. Knowing she will make fair distribution among our children when distribution shall be made.

The benefit of the foregoing devise has been formally accepted by the surviving wife, and her acceptance has been duly filed and entered of record in the proper court. After the probate of this will, the Citizens Savings & Trust Company and the First National Bank of Iowa City filed claims against the estate on account of alleged items of indebtedness which are still unpaid. After the death of the testator the widow caused her homestead, being the same which the family was occupying at the date of her husband's decease, to be designated and its boundaries to be marked by permanent visible monuments and a plat thereof recorded as provided by law. Thereafter and pending the settlement of the estate, plaintiff instituted this action in which the children and heirs of A. E. Swisher were made defendants. In her petition she alleges that, at the time of the death of A. E. Swisher, he owned the property which she has since had platted as her homestead as above stated, also certain other real estate, including an undivided one-fifth part of certain lands formerly owned by his father, Benjamin Swisher. Under the provisions of her husband's will and of the statutes of the state applicable to the situation she asserts title to the homestead and a one-third part in value of all other real estate left by the deceased, free and clear of the demands and claims of his creditors, and she asks a decree confirming her said claim of right and quieting the title in her accordingly. In this proceeding the creditors above named intervened, admitting that plaintiff was entitled to hold, free from liability for payment of their debts, a third share in all the real estate of which her husband died seised, but denying her right to any other or greater interest in the property occupied as a homestead. In other words, they concede her

a widow's one-third share in all the real estate, but deny that the statute or the will operates to give her any other or greater right in the homestead. In the next place, they aver that the right or interest which A. E. Swisher held in the land derived from Benjamin Swisher as aforesaid is for the purposes of this case to be treated as personalty, and not as realty, and plaintiff's right to any share therein is subject to the claims of the testator's creditors. The trial court found for the interveners upon both of these issues, and decreed that as against the claims of these creditors plaintiff had waived her homestead rights in the premises, and that the extent of her right in the real estate left by her husband is the one-third thereof, which, if she so elects, may be so set off or assigned to her as to include the homestead. From this decree the widow appeals.

I. Turning first to the issue upon the nature of plaintiff's right, if any, in the land held by her deceased husband under a conveyance made to him by his father, Benjamin Swisher, it appears from the record that prior to his death, which occurred in 1885, Benjamin Swisher, with the apparent purpose of making an equitable distribution of his estate, conveyed a considerable quantity of land to his sons, Lovell Swisher and A. E. Swisher, by deed with covenants of warranty, but declaring therein that the conveyance was in trust for the following purposes and upon the following conditions:

(1) That said trustees execute to the grantor a promissory note for \$8,000 bearing yearly interest and to become due in five years.

(2) That they also execute and deliver to the grantor a mortgage on the land to secure the payment of the note.

(3) That the trustees should not be personally liable for the payment of said note.

The remaining provisions we quote in the language of the instrument, as follows:



(4) Said Lovell Swisher and A. E. Swisher, trustees, shall have full, complete and absolute control of said real estate with authority to lease, work, farm or in any way manage or control same as in their judgment may be deemed best. The said trustees are also authorized and empowered, if they deem best, to cut and dispose of all wood and timber upon all of the said real estate, except what may be on the following described tracts, to wit: fifteen acres off of the east side of the southwest quarter of the northeast quarter also on the southeast quarter of the northeast quarter all in section seven, township 81, range 7. They are also authorized and empowered to make all necessary improvements and repairs upon the said property, premises, buildings, fences, etc., as may in their judgment be deemed best.

(5) Said trustees, Lovell Swisher and A. E. Swisher, are also authorized and empowered to sell and convey and they have full and complete power to sell and in them only is vested the power to sell and convey said real estate and they are empowered to pass by their deed as such trustees a full and complete title to said real estate. And in case of the death of either of said trustees the survivor is fully authorized and empowered to sell and pass the title to said real estate remaining unsold at such time. And further in case of the death of both of said trustees before the sale of any part or all of said real estate, then and in that case the authority and power to sell and convey said real estate unsold, shall pass to my legal heirs.

(6) In case of sale of said real estate by the said trustees aforesaid or in case of their death, by heirs as aforesaid, the above note of \$8,000.00 shall be first paid in full and in case of sale of any part of said real estate as aforesaid, as to that part sold, the said Benjamin Swisher or the holder of the above eight thousand dollar mortgage shall release the part so sold from the lien of said mortgage upon the proceeds of said sale being applied upon the payment of said note aforesaid.

(7) The proceeds of said real estate when sold or of the income therefrom before sale, after the payment of the interest on said note, the taxes on the land, all repairs and improvements made on the premises and all charges hereinafter mentioned and after the payment of the note of \$8,000.00 aforesaid, shall be by said trustees distributed

as follows, to wit: To Lovell Swisher or his heirs, to A. E. Swisher or his heirs, to Benjamin F. Swisher or his heirs, to Catharine Barrard or her heirs, to Stephen A. Swisher or his heirs, to John P. Swisher or his heirs, to each of the above a one-seventh part and to Elizabeth Cloud and Marie Cloud or their children each a one-fourteenth part.

(8) All interest upon the note aforesaid, all expenses for improvements and repairs made upon said real estate by said trustees, all taxes upon said lands or premises, and all expense incurred in the execution of this trust, together with reasonable compensation to said trustees in executing said trust, shall be a lien upon all said real estate for the payment of all the items and expenses aforesaid and in case the income from said real estate is not sufficient to pay said expenses, the balance remaining after exhausting said income shall be borne and paid by all the parties herein mentioned (except the aforesaid grantor) in the proportion and share as their interest is set out aforesaid.

(9) The share and portion of the proceeds of said real estate coming to said Elizabeth Cloud and Marie Cloud, the said trustees shall keep at interest until they attain the age of their majority. The share coming to each of them the said trustees shall invest in loans for them, and for said investments or for the care of said fund they shall pay said trustees reasonable compensation. And in case of the death of either of them without children leaving, the share that would have gone to said deceased one shall go to the survivors, and in case of the death of both of them without children leaving, then the share that would have gone to them shall go to the legal heirs of Benjamin Swisher.

It is conceded that the interest which Elizabeth Cloud and Marie Cloud acquired under the foregoing deed had been conveyed to Lovell Swisher and A. E. Swisher prior to the latter's death. It is also conceded that John P. Swisher died intestate after the death of Benjamin Swisher, leaving his interest to be divided among the other heirs. It is the theory of the interveners, and such appears to have been the view of the trial court, that said conveyance and the terms and conditions thereof operated to work an

equitable conversion of the land into personalty, and that the only right which A. E. Swisher acquired therein was the right to share in the income therefrom and in the proceeds of a sale thereof. That real estate may undergo equitable conversion into personalty under certain conditions of fact is too well established to require citation of authorities. Whether that effect follows in the case here presented depends upon the nature and validity of the trust and the nature and extent of the powers conferred upon the trustees. Turning again to the deed, we find that it clearly conveys the title to the trustees named; it grants to them authority to use, lease, and control the land, to cut timber thereon, and to make necessary improvements; it authorizes them to sell and convey the land, and, upon the death of both trustees without having exercised that power, it should pass to the legal heirs of the testator who were in such contingency given like power and charged with like trusts. If a sale was made, the proceeds were to be divided in equal shares between the living children of the grantor and the representatives of those who might then be dead. It will be observed that no date or time is fixed when this trust or power is to terminate. It is not made to depend upon the happening of any event determinate or indeterminate. It does not cease upon the death of the trustees, but passes from them to the heirs of the grantor. No direction or obligation is laid upon the trustees to sell the land, and, so far as expressed in the language of the grant, they could continue to hold the property indefinitely. The sale, if any be made, and the time and terms thereof are left solely to their discretion. The sole beneficiaries of the trust are named in the deed (being, as we understand it, all the grantor's heirs expectant then living), and among these beneficiaries are the trustees themselves.

In our opinion a conveyance upon such terms does not work an equitable conversion of the property conveyed so far as the grantees are concerned. That effect follows

only where by the express terms of the instrument or by necessary implication therefrom a sale of the property is imperatively required. *Hanson v. Hanson*, 149 Iowa, 84; *Darlington v. Darlington*, 160 Pa. 65 (28 Atl. 503); *In re Fox's Estate*, 52 N. Y. 530 (11 Am. Rep. 751); *James v. Throckmorton*, 57 Cal. 368; *Neely v. Grantham*, 58 Pa. 433; *Cooke v. Platt*, 98 N. Y. 35; 3 Pomeroy's Equity (3d Ed.) section 1160.

The deed from Benjamin Swisher unquestionably grants the power of sale, but we read it in vain to find any requirement of sale. On the contrary, it seems to treat the power of sale as discretionary only and to contemplate its indefinite continuation in the heirs of the grantor after the death of the trustees named in the deed. It is, to say the least, an open question whether such a trust is of any validity, or, if valid, whether it is more than a mere naked trust by virtue of which the trustees take no more than the legal title to the property of which the children or heirs of the grantor named in the deed are the beneficial owners. See *Cooke v. Platt, supra*.

In the case at bar, however, we need only to consider the effect of this deed as it relates to the grantee A. E. Swisher. As we have already noted, he is by the terms of the deed not only made a trustee, but is by the same instrument named as one of the beneficiaries of the trust. The necessary effect of making him a trustee for his own benefit was to vest him with the entire title and estate in and to his fractional or undivided interest or share in the property. As grantee in the deed he acquired the legal title, and as a beneficiary of the trust he acquired the equitable title or right to share in the distribution and the union of the legal and equitable title in the same person leaves nothing outstanding upon which the trust or delegated power can operate. That a person can not hold the legal title to land

1. TRUSTS:  
equitable  
conversion.

2. SAME: trust  
deeds:  
grantee as  
beneficiary:  
effect.

in trust for his own personal benefit is a proposition which inheres in the very nature of trusts. *Woodward v. James*, 115 N. Y. 357 (22 N. E. 150); Tiedeman's Real Property, section 512; *Mason v. Mason's Ex'rs*, 2 Sandf. Ch. (N. Y.) 432; *Wills v. Cooper*, 25 N. J. Law, 137; *Bolles v. Trust Co.*, 27 N. J. Eq. 308. In other words, the effect of the conveyance from Benjamin Swisher is to sink or merge the equitable right or title of A. E. Swisher in the legal estate conveyed to him by the deed, and the entire estate is vested in such grantee to the extent of his proportionate share in the property. In principle this case is quite identical with *Mason v. Mason*, *supra*. In that case the owner of property devised it in trust to three named trustees, one of whom was George Jones. By the terms of the trust George Jones was made one of the beneficiaries in the distribution of a surplus fund which was to be divided in the final settlement of the trust estate. In adjusting the rights of the parties the court there says: "In regard to George Jones, who in this instance is a beneficiary of the trust, the only consequence is that he takes a legal and not an equitable estate in his proportion of the surplus to be distributed." In *Bolles v. Trust Co.*, *supra*, the rule is stated as follows: "Where there is a devise to trustees one of whom is to take a beneficial interest in the trust property, he takes a legal estate to the extent of such interest." The rule thus stated is recognized by all the authorities to which our attention has been called. To the extent, therefore, of his proportionate interest or share, A. E. Swisher died seised of a heritable estate in the lands conveyed by Benjamin Swisher.

II. In the foregoing statement of the case we have omitted to note that among the items of the property left

3. EXEMPTIONS:  
burial lot:  
extent of  
exemption.

by the deceased is a burial lot in the cemetery at Iowa City, and plaintiff in her petition alleges that the title to this lot has been vested in her by the terms of the will free from liability for

her husband's debts, and asks that such exemption be established and confirmed by the court's decree. The trial court in disposing of the case failed to make any mention of this feature of plaintiff's claim, and upon the face of the decree, if literally construed, there is room for doubt whether the intervening creditors may not subject two-thirds of this lot to the payment of their claims. Although counsel for appellees do not argue the question, we think it safe to assume it is not proposed or intended to assert any claim adverse to appellant's title to the resting place of her dead. Under the law of this state the creditor's pursuit of his debtor is supposed to stop at the grave. To that end our statutory exemptions from execution for the benefit of the head of a family include "an interest in a public or private burying ground" (Code, section 4008); and it would seem that here at least is one right or privilege which an unfortunate debtor does not waive by dying. The very purpose of the act is to secure him and to his family a place of final earthly repose which shall be sacred against intrusion by the sheriff and the bill collector, and so far as we know that right has never been denied by the courts of this state. The omission in the decree below of any provision sustaining this exemption is without doubt the result of an oversight in framing the record entry—an error which will be corrected as a matter of course before the case is finally disposed of.

III. As will be seen by the foregoing statements, the interveners concede plaintiff's right to hold the one-third of the real estate and confine their efforts to a denial of her claim to any greater interest in the home-  
stead. This concession eliminates the other real estate from the field of controversy, and we shall therefor limit our investigation to the single question whether, under the circumstances—none of which are in dispute—the intervening creditors are entitled to subject two-thirds of the value of the homestead to the payment

4. SAME: homestead: extent of exemption.

of their claims against the deceased. The alleged right to resort to the homestead for the payment of these debts is based upon the proposition that, while the widow and her children would have been entitled to hold this property absolutely exempt from the claims of her deceased husband's creditors had he died without will, yet as he did leave a will giving her the title, and she accepted it, she thereby waived the exemption and exposed her home to levy and sale at the demand of said creditors. The proposition thus stated is a novel one in this court, and its answer involves a reading and construction of the statute which creates and defines all rights of homestead. The keynote of that statute is found in the opening section thereof, which reads as follows: "The homestead of every family, whether owned by husband or wife, is exempt from judicial sale where there is no special declaration of the statute to the contrary." Code, section 2972. The exemption, it will be noted, is not merely for the benefit of the husband or wife alone, but for the family of which they are a part. It was unquestionably within the power of the Legislature to make that exemption, unlimited, absolute, and without exception, and this is the clear effect of the provision we have just quoted, subject only to the restrictions found in the last clause. Stated otherwise, the statute clothes the family homestead with absolute exemption from the claims of the creditors save only in cases where the Legislature has expressly withheld that protection. If then in any case a creditor asserts the right to subject the homestead of his debtor to the payment of his claim against husband or wife, that demand will be refused and the right denied unless he can point out some statutory exception within the terms of which he brings himself.

Reading the statute through section by section, we find the following exceptions from the sweeping effect of the homestead exemption: (1) The homestead may be conveyed or incumbered where the husband and wife join in



the execution of the same joint instrument for that purpose. Code, section 2974. (2) It may be made subject to mechanics' liens for labor and materials furnished exclusively for its improvement. Code, section 2975. (3) It may be subjected to the payment of debts contracted prior to its acquisition and for debts created by written contract expressly stipulating for such liability and signed by both husband and wife. Code, section 2976. The foregoing provisions constitute and include every statutory exception to the exempt character of the homestead so long as the owner lives and does not abandon it. Concerning the effect of the owner's death it is further provided that: (4) Upon the death of either husband or wife the survivor may continue to possess and occupy the homestead until it is otherwise disposed of according to law, and the setting off the survivor's share in the real estate of the deceased spouse is a disposal of the homestead within the meaning of this provision. The survivor may elect to retain the homestead for life in lieu of such share, but if there be no survivor the homestead descends to the issue of the husband or wife exempt from the antecedent debts of their own or of their deceased parents. Code, section 2985. (5) *If there be no such survivor or issue*, it may be sold for the payment of debts without reference to its homestead character. Code, section 2986. (6) *Subject to the rights of the surviving husband or wife the homestead may be devised* like other real estate of the testator. Code, section 2987. If the interveners in this case have any right to enforce their claims against the homestead of the testator, it must be found somewhere in the six sections of the statute above cited, or in the statute of wills, in which it is provided that any person of full age and sound mind may dispose of his property by will subject to the rights of homestead and exemptions created by law and the distributive share given by law to the surviving spouse, but where the survivor is made a devisee it

5. SAME:  
devise of  
homestead:  
exemption.



shall be presumed, unless the intention is clear and explicit to the contrary, that such devise is in lieu of such distributive share, homestead and exemptions. Code, section 3270.

Do these sections or either of them expressly or impliedly provide that a widow's acceptance of a devise to her of the exempt property shall have the effect to destroy its exempt character in her hands and subject it to sale for the satisfaction of debts not one of which comes within the favored classes mentioned by the statute, and not one of which was contracted upon credit of its ownership by the debtor? Certainly no such provision is to be found in the express language of the statute. Can such meaning be extracted from it by any fair implication or reasonable construction? This inquiry must be answered with due deference to the well-established rule that the legislative language must be liberally construed with a view to promote the beneficent purposes of the enactment. Code, section 3446; *Bank v. Eyre*, 107 Iowa, 13; *Ebersole v. Moot*, 112 Iowa, 598.

True, as appellees argue, this does not mean that the court may by dictum or decision create a right of exemption where none is found in the statute; but it does affirm the very just proposition that, where the statute creates a general rule of exemption in favor of the family and the home, its protection shall not be denied in any particular case unless it clearly falls within some recognized statutory exceptions. Exemption of the homestead is the rule, its denial is the exception, and the courts have not the authority nor should they have the disposition to enlarge the exceptions beyond the plain import of the legislative expression. If creditors are clothed with any such right, it must be found somewhere in the several sections of the statute to which we have made reference. It is certainly not to be extracted from sections 2974, 2975, or 2976, for there is here no mortgage, mechanics' lien, or obligation ante-

dating the acquirement of the homestead, and there is no failure of issue which exposes the homestead to forced sale under section 2986. If the exemption is to be avoided, it must therefore be because of something to be found in sections 2985, 2987, or 3270. As we have already noted, section 2985 gives to the surviving widow an election between the life use of the homestead and her statutory share in the real estate of her deceased husband. Manifestly this section has special reference to cases where the spouse holding title to the homestead dies without will, while the remaining sections cited (2987 and 3270) deal more particularly with cases where the situation is affected by the existence of a will. Section 2987 does no more than provide that, subject to the rights of a surviving spouse, the homestead may be devised like other real estate. This provision is coupled with no statement or declaration that such devise shall affect the exempt character of the property. Section 3270 is to the effect that where the will makes special provision for the survivor, and the contrary intent is not clearly apparent, it shall be presumed to have been intended in lieu of distributive share, homestead, and exemptions, and in such case the survivor can not rightfully claim the benefit of both the statute and the will but must choose between them. But suppose the will gives to the widow the very property, real and personal, which in the absence of a will she and her children could rightfully hold absolutely exempt from the claims of creditors, and she sees fit to accept the devise, is she thereby stripped of the protection which otherwise would not be open to question? Certainly the statute does not so expressly provide, and such a result is so manifestly unreasonable and unjust that the intention ought not to be attributed to the Legislature by mere implication or construction. We have held that one spouse may convey the homestead to the other, or both may unite and convey it to an entire stranger without affecting its exemption, and this is true even though such transfer

has been made with the intent or belief that thereby they were hindering or delaying creditors in the collection of claims. *Payne v. Wilson*, 76 Iowa, 377; *Beyer v. Thoeming*, 81 Iowa, 517; *Butler v. Nelson*, 72 Iowa, 732; *Officer v. Evans*, 48 Iowa, 557; *Griffin v. Sheley*, 55 Iowa, 513; *Dettmer v. Behrens*, 106 Iowa, 585; *Delashmut v. Trau*, 44 Iowa, 613.

It will be observed that section 3270 couples together and subjects to the same conditions the widow's distributive share, her homestead, and the other general exemptions provided by law in favor of the family, and if interveners' contention is right, and the acceptance of a devise of such property waives the exemptions provided by statute, then she may hold absolutely nothing against the demands of her husband's creditors, and they may take from her the last fraction of his estate and throw her and her children penniless upon the world. To so hold is to say that, while the court will protect the homestead against creditors even where the debtor voluntarily conveys it to a stranger with intent to defraud, yet, if the debtor gives it by his will to the wife whom he is bound by the most sacred of ties to provide for and protect, the creditors may intervene and absorb the estate to the last dollar. If they may take the homestead, then by the same token and the same process of reasoning they may take her dower or distributive share, the family horse, the last cow, and all the other items of comfort and necessity which the statute has sought to preserve for the benefit of the family. True, as we have already said, appellees concede to plaintiff the right to a distributive share in her husband's estate, and because of this concession we do not undertake to deal with that phase of the decree below; but it must be said that, if their position in that respect is well taken, then their claim as relates to the effect of the will upon the homestead is clearly illogical and unsound.

Counsel argue that to sustain the widow's right to

hold this homestead is to enable her to hold more property against her husband's creditors than the statute would otherwise give to her, for, they say, had she refused to take under the will, then two-thirds of the homestead would have been subject to the payment of the testator's debts. But is this true? Suppose the widow had refused the devise and asserted her statutory rights, upon what theory would this have enabled the interveners to have seized the homestead or any part of it? There is of a certainty no express statute to that effect, nor do we find anything requiring such construction. The will so far as it relates to the homestead affects in no manner the interests of the creditors. It may affect the interest which would have otherwise passed to the heirs, but it neither increases nor decreases the fund to which creditors may rightfully look for the payment of their claims. Let us suppose, for instance, that the deceased had left no other estate than this confessedly exempt homestead, and that by will he devised it to his wife; then, according to the contention of the appellees, her refusal of the devise would operate to leave two-thirds of the homestead subject to the claims of creditors, and her acceptance of it would be followed by the same result. Thus the effort of the husband to secure to his family the benefit of property which the law has set aside for its protection and upon which the creditors have neither legal, equitable, nor moral claim would be made the excuse for a denial of that protection. We are unwilling to affirm that doctrine.

The question here raised has not often had the consideration of the courts, and the lack of uniformity in homestead statutes ordinarily renders reference to adjudicated cases of uncertain value but we find a few decisions the reasoning of which is quite in point in this discussion. Thus, in *Myers v. Myers*, 89 Ky. 442 (12 S. W. 933), the Kentucky court, dealing with a like question, says: "It has been decided by this court more than once that the

owner of a homestead has power under the statute to convey by deed and pass a good title to the property, not exceeding \$1,000 in value, the reason being that such conveyance does not affect rights of creditors (referring to *Brooks v. Collins*, 11 Bush (Ky.) 622, and *Richard v. Utterback* (Ky.) 9 S. W. 422), and we see no reason why he may not do practically the same thing by will, because his creditors are prejudiced in one state of the case no more than in the other; in fact, they are not wronged in either, but in both the object of the law, which is to secure to every housekeeper with a family a certain and uninterrupted enjoyment of a homestead, is accomplished." The same rule is affirmed in *Pendergest v. Helkin*, 94 Ky. 384 (22 S. W. 605).

In Minnesota the statutes governing the descent and devise of homestead property are substantially the same as our own, except that a valid devise thereof requires the written assent of the surviving spouse. Where a surviving widow after the testator's death indicated her consent to a devise of her homestead, and it was claimed by creditors that the exemption was no longer available, the court overruled the point, saying: "When living the owner may sell and convey the homestead, or he may make a fraudulent transfer of the same, and such sale, conveyance, or transfer does not render the property liable for his debts. It is absolutely exempt. The effect of section 4470 is to allow a homestead to descend or to be devised as therein provided free from all claims on account of indebtedness. The election of the surviving husband or wife to take under the will in such case does not affect the creditors or take from them any assets out of which they are entitled to have their claims satisfied. The written assent of a surviving husband or wife to a testamentary disposition of the property has no effect upon the exemption and can not be regarded as rendering the same liable for the satisfaction of

the devisor's debts." *Eckstein v. Rall*, 72 Minn. 95 (75 N. W. 112).

None of our cases cited by the appellees are inconsistent with this conclusion. Counsel rely largely upon *Meyer v. Meyer*, 23 Iowa, 359, and *Stevens v. Stevens*, 50 Iowa, 491, and others of the same class holding, as the statute clearly provides, that a widow can not take both homestead and distributive share in her deceased husband's estate. But in none of these cases has the court attempted to consider or pass upon the effect of a wife's acceptance of a devise of the property constituting the homestead. The statute expressly provides that the homestead shall be devisable, but nowhere declares that its devise shall operate to destroy its quality of exemption. Much of the argument of appellees proceeds upon an incorrect assumption of the position taken by the plaintiff. She is not claiming the property under the statute which gives her an election between distributive share and the right of life occupancy. She claims the fee by virtue of the devise and the statute which makes it absolutely exempt except where otherwise specially provided. In this position we think she is sustained both by the letter and the spirit of the statute.

The only statutory authority for subjecting the homestead of a deceased person to payment of the claims of general creditors is where the deceased leaves no surviving spouse and there is a failure of issue. Code, sections 2972, 2985, 2986.

It follows from this conclusion that, in so far as the decree below operates to subject the homestead to the payment of the interveners' claims, it must be reversed, and the cause will be remanded for a modified decree in harmony with this opinion. The decree will also confirm and quiet the title to the cemetery lot in the plaintiff.

*Affirmed in part; Reversed in part.*

**THE CITY OF CHEROKEE, Appellant, v. THE ILLINOIS  
CENTRAL RAILROAD COMPANY, et al., Appellee.**

**Appeal: DISMISSAL: WAIVER.** Mere delay in the prosecution of an  
1 action, if ground for the dismissal of an appeal, is waived by  
failing to raise the question in the trial court.

**Same.** The presumption obtains that public officers perform their  
2 duties faithfully and with due diligence; and a mere showing  
of delay on the part of the trial court in ruling on a motion  
to dismiss the action will not justify its dismissal on appeal  
because of plaintiff's failure to prosecute.

**Same: MOOT QUESTION.** Where no issue of fact or law has been  
3 joined in the trial court the appellate court can not say, on a  
motion to dismiss the appeal, that the controversy presents only  
a moot question.

**Same: ABSTRACT: INADVERTENT ERROR.** The inadvertent use of the  
4 term defendant instead of plaintiff, in abstracting the record re-  
garding the perfection of an appeal by service of notice, which  
could in no manner have been misleading, will not deprive the  
appellate court of jurisdiction.

**Same: AUTHORITY OF COUNSEL TO APPEAR: PRESUMPTION: WAIVER:  
5 PROCEDURE.** It will be presumed that a city solicitor in appearing  
for the city was authorized to do so, in the absence of a showing  
to the contrary; and where there was no ruling by the trial  
court on a demand that the solicitor show his authority the  
demand will be treated as waived, and the action will not be dis-  
missed on appeal from a judgment of dismissal by the trial  
court but will be permitted to stand for further proceedings.

*Appeal from Cherokee District Court.—HON. WM. HUTCH-  
INSON, Judge.*

FRIDAY, OCTOBER 25, 1912.

THE opinion states the case.—*Reversed.*

*William Mulvaney*, for appellant.

*Helsell & Helsell, Molyneux & Maher*, and *Blewett Lee*, and *W. S. Horton*, for appellees.

WEAVER, J.—The defendant's line of railroad passes through the city of Cherokee, and of necessity crosses the streets which intersect its right of way. On December 19, 1900, the plaintiff city by its solicitor filed herein a petition alleging that at the point where said railroad crosses Second street, a public highway, defendant, acting without authority so to do, had erected abutments on either side of said street, each extending thirteen feet into the public way and wholly obstructing the sidewalks, and that within the remaining space within these abutments defendant was in the act of erecting others, thereby further obstructing the public use of the way. It further alleged that said work of obstruction had been done or was being done notwithstanding the company had been warned and ordered by the city not to do so. On this showing a temporary injunction was asked to restrain the further prosecution of the work, and that upon final hearing the injunction be made permanent. A temporary injunction was issued. Motion was thereupon filed by the defendant to vacate the writ, stating several grounds thereof, among which was an allegation that the action had been begun by the city solicitor without authority granted by the city council, which statement was supported by the affidavits of the mayor and three aldermen. The motion to dissolve the injunction was sustained December 21, 1900; the ground of the ruling not being stated.

On January 7, 1900, defendant filed a motion to require the solicitor, William Mulvaney, to show his authority for his appearance in the action, and to dismiss such action as having been begun without authority. In support of the motion reference was made to the affidavits filed



in connection with the motion to dissolve the injunction. In resistance to this motion, the solicitor presented the record of a resolution adopted by the city council on November 7, 1900, as follows: "Moved and seconded that the obstruction or nuisance on North Second street, which is placed there by the Illinois Central Railroad Company, be ordered abated at once and that the proper notice be served upon said company. Vote—Webber, yes; Nicholson, yes; Wilkie, yes; Reigle, yes; Lockyer, yes; Paterson, not voting. Motion carried."

There was a further showing by affidavits of members of the city council to the effect that, immediately after the passage of this motion and in the presence of the council, the mayor directed the solicitor to look after or take charge of the matter, and that said order had never been rescinded. The solicitor added to his own affidavit to the same effect, and averred that in bringing the action he acted upon authority given by the council and the order of the mayor, and that such authority was still unrevoked. The defendant thereupon responded with a motion to strike parts of the affidavits.

In rebuttal of the matter stated in such affidavits, defendant filed a certified copy of a resolution alleged to have been adopted by the city council under date of January 2, 1901, as follows:

Be it resolved by the city council of Cherokee, Iowa, in regular session assembled, that the resolution of this council heretofore passed on the 7th day of November, 1900, which read as follows: 'Moved and seconded that the obstruction or nuisance on North Second street, which is placed there by the Illinois Central Railroad Company, be ordered abated at once, and that the proper notice be served upon said company,' be and the same is hereby rescinded, annulled, and canceled, and that the action taken by said city council giving authority to the Illinois Central Railroad Company to build its new railroad bridge at what is known as Second street crossing over said Second street

in the manner and after the plans as shown by the map heretofore filed by said company with the city council and which said plan and map of said proposed new bridge across said Second street was by resolution of the city council, duly approved, be changed as follows: 'And be it further resolved that the plan of erecting said bridge over said crossing and the occupancy of a portion of said Second street on each side for abutment purposes as the same are now constructed, according to the plans herewith submitted and filed with the city council be and the same is hereby adopted and approved.'

It is also agreed to by the said Illinois Central Railroad Company that they shall provide and maintain two incandescent lights which are to be placed in the vicinity of the aforesaid bridge, and, at the direction of the city council, that they shall also construct the sidewalk on the outside of the piers or abutments—that is, next to the company's right of way—they shall also provide a protection so as to keep the dirt from falling from the embankment on the sidewalk, and shall also drive the first row of piling which are shown to the diagonal, parallel with and clear of the sidewalk.

It was moved by Reigel and seconded by Webber that said resolution as read be adopted and approved. The motion being put to a vote, the yeas and nays were called for, and each alderman cast his vote as follows: Webber, yes; Paterson, yes; Reigel, yes; Wilkie, no; Lockyer, no; Nicholson, no. The result being announced and found to be a tie, the mayor cast his vote in favor of said motion, and the motion declared carried, and said resolution was declared adopted.

It may here also be said that in resistance to the motion to dismiss, plaintiff denied the adoption of the foregoing resolution on the ground that Paterson, one of the members of the council without whose vote the motion would have been lost, was the agent at Cherokee for the defendant railroad company, and therefore disqualified to take any part in disposing of that question. The motion to require counsel to show authority for prosecuting the action and to

dismiss was submitted on January 25, 1901, and by the court taken under advisement. The court appears to have found difficulty in agreeing with itself upon the questions thus presented, for it kept them under advisement for a period of ten years, when at its January term, 1911, a ruling was entered sustaining the motion and dismissing the proceedings with judgment against plaintiff for costs. From this ruling and judgment the present appeal has been taken.

I. Appellees move this court to dismiss the appeal because of the unreasonable delay in prosecuting the case in the court below, because there is no longer any question to be decided, except the moot question of the city solicitor's authority to bring and prosecute the action, and because the abstract fails to show that an appeal has been perfected. The motion can not prevail. The order and judgment appealed from were entered less than six months prior to the taking of the appeal, and there has been no delay in this court of which appellees can complain. If the delay below afforded good ground for dismissal, the objection should have been raised there, and, failing so to do, must be considered waived.

Moreover, we think plaintiff can not justly be charged with delay because of the time taken by the court in meditation upon its ruling. In the absence of showing to the contrary, it is a charitable presumption of the law that men and especially public officers perform their duties faithfully and with due diligence. The record before us shows, it is true, a *hiatus* of ten years between the submission of the motion and the ruling thereon, but nothing more. From that fact alone we do not feel at liberty to say that the court was not at all times diligently considering the legal *enigma* submitted for its solution, or to assume that the city solicitor was not present at each recurring term of court holding his official zeal firmly in leash, but ready to pursue

1. APPEAL: dismissal: waiver.

2. SAME.

the prosecution to the last ditch whenever the court gave him the opportunity to do so.

Nor can we say from the record that only a moot question remains in the case. No answer has yet been filed, and the sufficiency of the petition has not been tested by demurrer. Until that is done and an issue of fact or of law has been tendered, the case will not be in a condition where we can say the question to be decided does or does not present a substantial controversy.

3. SAME:  
moot  
question.

The objection to the sufficiency of the appeal has been stated only in quite general terms, but the thought of counsel seems to be that the abstract does not properly show service of notice. The statement in the abstract is as follows: "And afterward, on the 1st day of July, A. D. 1911, the defendant perfected its appeal to the Supreme Court of Iowa by serving notice thereof upon Herrick & Herrick, attorneys of record in said cause for the defendants, and also upon H. L. Loft, clerk of the district court of Iowa in and for Cherokee county, which said notice so served together with the proof of service thereof was duly filed in said cause on July 1, 1911, as a part of the records thereof." The point of this objection will be seen when we note that the word "defendant" where it is first used in the quoted language appears to have been mistakenly employed for the word "plaintiff." The mistake is so evident that no one could be misled thereby. It has been held by us on several occasions that the use of the word "plaintiff" for "defendant" and *vice versa* in instructions to the jury is not reversible error, where the real meaning and purpose are clear, and there is no reason for greater testimony in an appeal notice. More directly in point we have held that where a notice of appeal mistakenly uses the defendant's name for the name of the plaintiff, and the error is manifest upon the face of the notice, it does not deprive this court of jurisdic-

4. SAME:  
abstract: in-  
advertant  
error.

tion to entertain the appeal. *Heinz v. Roberts*, 135 Iowa, 748, and cases there cited. The rule of these precedents is a reasonable one, and we are not disposed to depart from it. The motion to dismiss the appeal is therefore denied.

II. The court below did not expressly rule upon the question requiring the plaintiff's solicitor to show the authority by which he appeared in the case, and we think that

5. SAME: authority of counsel to appear: presumption: waiver: procedure. part of the defendant's demand must be considered as abandoned or waived; for, if sustained, the regular course of procedure would have been to afford the solicitor opportunity

to make the demanded showing of authority, and, until that was done, the court could not properly have dismissed the case on that ground. Moreover, the record shows, as already stated, that this action was begun December 19, 1900, while the order or resolution of the council adopted November 7, 1900, was admittedly still in force. The suit was begun by the acting city solicitor in conformity to the policy indicated in that resolution, and, as he alleges, under the direction given him by the mayor in the presence and with the apparent consent of the city council. To say the least, the very appearance of the city solicitor in court prosecuting an action in the name of the city carries with it a presumption of authority which the court will not disregard upon any uncertain or doubtful showing. Whether as such solicitor he may without order or consent of the council bring an action in the name of the city to enjoin or remove an obstruction of a public street we need not here decide. We regard it clear that the presumption of his authority to begin the suit has not been overcome. Such being the case, if it be true that since the bringing of the action the defendant has by a valid compromise or settlement made with the city, or by removal of the alleged obstruction, or otherwise, put an end to the controversy, that fact gives no ground to question the authority of the solicitor to appear in the case. If the fact be conceded or clearly

appears of record, the court may, of course, put an end to the proceedings, and order a dismissal, but if not conceded, or if not apparent on the record, the remedy of the defendant is to plead the alleged adjustment as a defense, and, if issue be joined thereon, try it out in the manner provided for the trial of other issues. Here there is a dispute. Plaintiff is still in court, denying the authority of the council to permit the obstruction of the street, or, if such authority exists, denying that it has ever been legally exercised. If it be true that the city does not wish to prosecute the case, there is nothing to prevent its coming into court and saying so, and, in the absence of such action on its part, we think it is not open to the trial court to make it a ground for dismissing the action on motion of the defendants.

The question of the defendant's right or authority to occupy the street is not before us in a form or manner to call for a decision at this time. The facts except as broadly stated in the petition do not appear in the record. It is enough at present to say that the allegations there made appear to state a cause of action, but, as already suggested, no issue has yet been taken thereon, and we can not undertake any adjudication of the merits of the case upon the record now before us.

As we have above indicated, we think the motion to dismiss should have been overruled. The judgment below is therefore reversed, and cause remanded for further proceedings not inconsistent with the views expressed in this opinion.—*Reversed.*

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OSCAR NELSON, Appellant, v. JOHN M. WILSON, C. O.  
WILSON, WILLIAM WILSON and BERT WEED.

**Division fences: PAROL AGREEMENT: STATUTE OF FRAUDS: DAMAGES.**  
The oral agreement of adjoining landowners to erect and maintain a division fence, which was carried out by its erection,

although not a lawful fence or one sufficient to turn stock at all times, is provable and binding upon the parties and their tenants acquiescing therein; as an agreement of that character does not contemplate any interest in the land. And where the cattle of one escaped through the other's portion of the fence, because of his negligence in failing to keep the same in repair, and were damaged thereby, the other is liable for the injury.

*Appeal from Crawford District Court.*—HON. Z. A. CHURCH, Judge.

FRIDAY, OCTOBER 25, 1912.

A DEMURRER to the petition as amended was sustained, and, as plaintiff elected to stand on the ruling, petition was dismissed. Plaintiff appeals.—*Affirmed in part, and Reversed in part.*

*C. R. Metcalfe*, for appellant.

*Harding & Kahler*, for appellees.

LADD, J.—The plaintiff and O. C. Wilson were tenants of adjoining farms, the S. W.  $\frac{1}{4}$  and the S. E.  $\frac{1}{4}$ , respectively, of section 11, in Willow township. The owners had erected a division fence between the quarters about twenty-three years before—plaintiff's landlord the north half, and Wilson's landlord the south half—in pursuance of an oral agreement, and thereunder have since maintained their respective parts. But the south half of the fence was never "a lawful or good and substantial fence," but was built "of sticks for posts, set from fifteen to twenty feet apart, and some further; and that part of the sticks were not more than two or three inches thick, and from five to six feet long, and he placed thereon three wires, which were from fifteen inches to two feet apart, and not of sufficient strength to prevent stock, cattle of

ordinary habits, from going through the same. That said fence during the last twenty years became old, the posts broken, wires rotten and broken to pieces, loose and insecure, and so remained in said condition up to and during the year 1909, and at the time of the happening of the grievances hereinafter stated."

Plaintiff and Wilson acquiesced in the above division, and the latter rebuilt and repaired some of his portion of the fence, and plaintiff had requested Wilson to put said fence in lawful condition, so as to turn his cattle, but this he failed to do. On the west side of it was the plaintiff's pasture, and to the east Wilson planted corn; the inside row being a foot or two or three from the fence, and, as he cultivated, it grew until ten or fifteen feet high, with roasting ears and leaves within a few inches from the fence, and by these plaintiff's cows were tempted, and they in their weakness yielded by reaching their heads between the wires and eating some of the roasting ears, and having tasted "were allured and enticed to walk and go into said field; the fence being dilapidated, wires loose, and posts broken and in such a bad condition that it admitted said cattle without restraint." They ate until "sick and foundered," as a result of which two of them died, others failed in the flow of milk, and still others would not fatten, all to plaintiff's great damage, for which he prays recovery. To a petition and amendments thereto so alleging, in substance, and that plaintiff's landlord had at all times maintained his part as a lawful fence, and that defendants were estopped from denying the partition of the division fence, that this had been ratified and established by prescription, the defendants demurred, on the grounds: (1) that the division fence was never a lawful fence, even though constructed by oral agreement, and for this reason neither Wilson nor his landlord owed any duty with respect thereto; (2) the partition was not made as prescribed by statute, and the oral agreement was never



performed by constructing or maintaining a lawful fence; (3) plaintiff's cattle were trespassing, and defendants owed no affirmative duty of caring for them and (4) plaintiff was aware of conditions as they existed, and was at fault in turning his cattle into the pasture. The demurrer was sustained, and it is of this ruling that complaint is made.

The respective owners of adjoining tracts of land under cultivation may be compelled to erect and maintain partition fences, or contribute thereto. Section 2355, Code. The portions each shall so erect and maintain may be designated by the fence viewers (sections 2356, 2357); or the owners may agree upon partition of division fences, in writing, signed by them, duly acknowledged and recorded. Section 2361, Code. A lawful fence is defined by section 2367, but, as the petition alleges that the one in controversy was not such as to constitute such a fence, it need not be set out. The conflict in the authorities as to whether an oral agreement dividing a line fence was within the statute of frauds was alluded to in *De Mers v. Rohan*, 126 Iowa, 488, where the decisions are cited, and we said that, "in providing for a written agreement, and specifying the circumstances under which it will be binding, the intention to exclude any other is manifest. Possibly an agreement in parol, when executed, may be good between the immediate parties thereto." The petition clearly alleged that such an agreement was entered into by the owners of the land and had been acquiesced in by the tenants. This agreement had not been executed in the sense that the parties had erected lawful partition fences, or even such as at all times were sufficient to turn stock. But each had undertaken to erect a fence along the line set apart to him, and each undertook to carry out the agreement. The performance of the oral agreement mentioned in the books is not that of maintaining a lawful fence, but that of erecting and keeping in repair a fence along the line which, by agreement, has been set apart

to him. This agreement had in no manner been revoked, and we can see no reason why the landlord of defendant, as well as defendant, should not be bound by their undertaking. Such an agreement does not contemplate the sale or disposition of land. It is merely a promise of one person, in consideration of a like undertaking of another, to construct and maintain a fence along a particular line, and, having been performed, there is no reason why the parties thereto should not be bound thereby until revoked. *Tupper v. Clark*, 43 Vt. 200; *York v. Davis*, 11 N. H. 241; *Glidden v. Towle*, 31 N. H. 147; *Guyer v. Stratton*, 29 Conn. 421; *Ivins v. Ackerson*, 38 N. J. Eq. 220 where the court said: "Such a partition does not, obviously, confer any interest in the land. It does not even transfer any right to the fence, or to any part of it. It does not create any new duty; nor does it impose any new burden. Its whole effect is to assign to each party his share of the duty which the land requires to be performed." See *Pitzner v. Shinnick*, 41 Wis. 676; *Contra*, *Osborne v. Kimball*, 41 Kan. 187 (21 Pac. 163). Of course, such an agreement is not binding on third parties, nor after revocation. *Pitzner v. Shinnick*, *supra*.

According to the allegations of the petition, then, the cattle got through the fence because of defendants' fault in not maintaining the same as they had agreed, and if plaintiff suffered injury because thereof he was entitled to recover. Any inquiry as to plaintiff's fault in turning the cattle into this pasture must be determined on the facts as they appear at the trial.

As to defendants other than O. C. Wilson—*Affirmed*.  
As to O. C. Wilson, it is—*Reversed*.

A. R. A. RYSTAD, Appellee, v. DRAINAGE DISTRICT NO. 12, et al., Appellants.

**Drainage: APPEAL: PETITION: SUFFICIENCY.** A party appealing from  
1 an assessment for drainage purposes made by a board of supervisors, who sets out in his petition the several assessments reported to the board and the amount thereof, the objections made thereto and the confirmation of the assessments, and follows the same by specific objections and the grounds upon which he demands a reduction, sufficiently complies with the statute requiring that he shall file his petition at the next succeeding term of court, setting forth the order or decision appealed from and his claim and objections relating thereto.

**Same: ASSESSMENTS: PRESUMPTION.** On appeal from a drainage  
2 assessment made by the commissioners it will be presumed that they have considered all the evidence bearing on the question of benefits, in the absence of a contrary showing; but if it appears that they have refused to consider evidence having a legitimate bearing on the question of assessments, and the trial court has rectified the error by a proper modification of the assessments, its finding will not be disturbed. In this instance the assessments as reduced by the trial court are upheld.

*Appeal from Buena Vista District Court.*—HON. A. D. BAILIE, Judge.

FRIDAY, OCTOBER 25, 1912.

APPEAL from judgment of the district court reducing the assessment made upon plaintiff's land for the construction of a ditch.—*Affirmed.*

*Jones De Land*, for appellants.

*F. H. Helsell*, for appellee.

WEAVER, J.—This appeal involves no objection to

the regularity of the proceedings by which the drainage district was established and the ditch excavated. The single question raised, though variously stated, goes to the alleged excessive assessment upon the lands of the plaintiff. This assessment the plaintiff alleges is excessive, is not in proportion to the benefits derived by his land from the improvement, and that the classification of said lands was not fixed according to the benefits; his land being already drained, in whole or in part, by a ditch constructed at his own expense, thereby reducing the benefits which might otherwise result from the public ditch. The plaintiff's land consists of four forty-acre tracts, upon which the assessments as levied by the board of supervisors range from \$124.95 to \$1,347.97 and aggregate \$2,777.15. Upon appeal, the district court reduced the assessment upon one tract from \$1,347.97 to \$950, and upon another from \$941.35 to \$625. From this ruling the present appeal has been taken on behalf of the drainage district.

I. Appellants first assign error upon the ruling of the district court denying their motion to dismiss plaintiff's appeal from the assessment made by the board of supervisors. The grounds stated for the motion are, first, that no right of appeal exists in such cases; and, second, that plaintiff failed to file a petition as required by statute. The first objection is not urged in argument, and we shall not consider it.

In support of the second objection, reliance is placed on the statutory provision that an appealing party shall "on or before the first day of the next succeeding term of

1. DRAINAGE: appeal: peti- tion: suffi- ciency.	the district court file a petition setting forth the order or decision appealed from and his claims and objections relating thereto."
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Chapter 118, Acts 33d G. A. The plaintiff did file a petition within the proper time; but defendants insist that it is insufficient, because it does not set out a full or

true copy of the order appealed from, and this failure, it is said, operates as a waiver of the appeal. There was no error in overruling the motion. Turning to the petition, we find it does state the several assessments reported by the commissioners and the amount thereof, the objections made thereto, and the confirmation of such assessments by the board. It then proceeds to state specifically plaintiff's objections to the assessment and the alleged reasons upon which he demands a reduction thereof. This, we think, was sufficient. It comes fairly within the letter of the statute, and is clearly as full and specific as was necessary to apprise the defendants of the very questions to be considered.

II. The objection made, that plaintiff receives no benefit from the improvements, and that his assessment should, at most, be for a nominal sum only, was without merit. He was a principal promoter and petitioner for the ditch, and it is clearly apparent that his lands were materially improved in quality and value by reason of this drainage. Indeed, he has not appealed from the assessment as fixed by the district court, and the only question we have to determine is whether, upon the record, the district court erred in its judgment that the assessments made by the board be reduced from an aggregate of \$2,777.15 to \$2,062.83.

2. SAME: assessments: presumption.

It appears that the drainage district includes thirty-two forty-acre tracts of farm land, eighteen town lots, certain highways of two townships, and a section or part of the Minneapolis & St. Louis Railway. The total expense to be provided for was \$10,083.94. Of this sum \$1,364 was assessed upon the railway and the highway districts, and \$185.74 upon town lots, leaving \$8,531 to be apportioned upon the farm lands. Plaintiff's farm constitutes in area  $12\frac{1}{2}$  percent of such lands. The assessment made by the board charges him with  $32\frac{1}{2}$

percent of the sum apportioned to the agricultural lands, and the reduced amount fixed by the court is about 23 percent thereof. It is, of course, true that the various elevations of these tracts and their general topography is doubtless such as to make more or less variation in the benefits derived from the ditch, and consequent differences in the amounts with which they should severally be charged. It is equally true that the apportionment should be made upon a plan which will equalize the burden among those benefited by the improvement as nearly as is possible, in view of all the circumstances. As we have had frequent occasion to suggest, the consideration of appeals of this nature is a matter of much difficulty for this court; it being scarcely possible from the printed record to obtain a clear and comprehensive view of all the facts and circumstances affecting the situation. Where the question is one turning upon mere estimates of benefits or values, and it appears that the supervisors have taken into consideration all the evidence bearing thereon (and, in the absence of any record to the contrary, they will be presumed to have done so), we are always strongly inclined to sustain their assessment, where it can be done without ignoring the rule giving effect to the findings of the trial court upon disputed facts. If, however, it is made to appear, or is admitted, that the supervisors refused to consider evidence bearing legitimately upon the matter of assessment, or their finding is clearly against the evidence, and the trial court has rectified the error by modifying such assessments, there is no good reason why we should reverse its judgment.

In the case before us it is shown without controversy that, prior to the organization of the drainage district, plaintiff had undertaken to drain his land by purchasing at large expense an outlet upon the lands of a neighbor, and by laying large tile from the principal pond on his land to this outlet. The plan of the public ditch con-

templates a connection between it and the plaintiff's private ditch, thus increasing the carrying capacity of the system. That this ditch did not completely drain his land is doubtless true; but it did drain much of the surface water, and to a considerable degree reclaimed the land. In other words, this private drainage did add materially to the quality of the land and thereby, we must presume, added to its value. To this extent the amount of benefit which would have resulted to the land from the public ditch is necessarily less than it would have been, had the land been wholly undrained when the public enterprise was entered upon. Whether this element was considered in making the assessment is not entirely clear, and the testimony of the commissioners with respect thereto is not entirely consistent. The record as a whole and the result reached by the board of supervisors convince us, however, that the allowance to plaintiff on this account was merely nominal, and such, we conclude, was the view of the trial court.

We shall not undertake any synopsis of the evidence. It is enough to say that, in addition to the matters already mentioned, there was other testimony, expert and non-expert, tending to show that plaintiff's land was given too high a classification on account of benefits resulting in an excessive assessment. This, of course, was not admitted by the defendants, and they offered considerable evidence in support of their contention that the classification and assessment were fair and reasonable. Upon this issue the trial court found with the plaintiff, and its finding is not so manifestly wrong or unsupported by the record that we are at liberty to interfere with it.—*Affirmed.*

BARBER ASPHALT PAVING COMPANY, Appellant, v. STANDARD FIRE INSURANCE COMPANY, Appellee.

**Trial:** ASSIGNMENT OF CAUSE NOT AT ISSUE. While there is no statute  
1 expressly providing that cases shall not be peremptorily assigned  
for trial before issue has been joined, such is the fair inference to  
be drawn from the statutes providing for the filing of trial  
notices and the assignment of trial causes.

**Same:** DISMISSAL OF ACTION: REINSTATEMENT. Where a cause was  
2 assigned for trial by the court before issue had been joined and  
dismissed for want of prosecution, the plaintiff, under the record  
in this case, was entitled to have the dismissal set aside and  
the cause reinstated on motion at the same term, and he was  
not confined to the usual motion for a continuance.

*Appeal from Lee District Court.*—HON. W. S. HAMILTON,  
Judge.

FRIDAY, OCTOBER 25, 1912.

ACTION at law upon a policy of fire insurance. The case having been assigned for trial, and plaintiff not appearing on the date so fixed, a dismissal was ordered and a judgment entered for costs. Thereafter plaintiff moved to reinstate the case, making a showing of merits and of circumstances explaining and excusing its failure to appear on the day assigned. Motion overruled, and plaintiff appeals.—*Reversed.*

*Read & Read*, for appellant.

*William C. Howell*, for appellee.

WEAVER, J.—The policy in suit was issued October



15, 1908, and while it was still in force it is alleged that the insured property was destroyed or injured by fire. Attempts at adjustment of the claim having failed, plaintiff began this action in the district court of Lee county, being represented therein by Read & Read, its counsel at Des Moines, Iowa. The petition was filed July 21, 1909. On December 17, 1910, a motion for more specific statement of the alleged cause of action was sustained, and in response thereto an amendment was filed March 13, 1911. This amendment was assailed by another motion, which was sustained April 3, 1911. On May 29, 1911, another amendment was filed to meet the ruling of the court. The defendant then moved to dismiss the action. The motion was overruled. On June 12, 1911, plaintiff's counsel not being present in court, and having no notice or knowledge of the order, and the defendant not having answered or taken issue upon the petition, the court set the cause for trial on June 16, 1911. On June 13, 1911, the defendant filed an answer, and on June 14th a copy thereof was mailed by the clerk to Read & Read at Des Moines. On June 20, 1911, the case was called for trial and, plaintiff not appearing, the dismissal was entered, as already noted. It further appears that the copy of the answer mailed to Read & Read reached them on the 15th. On June 14th the clerk sent notice of the order of assignment to said counsel, which was received at Des Moines on June 16th. They at once replied, calling the court's attention to the fact that the cause was not at issue when set for trial, and that the answer raised controversy upon points which would require the taking of evidence in the states of Illinois, New York, and Connecticut, and that it was impossible for them to go on with the trial at that time, for which reasons they asked that the time for trial be fixed for the next ensuing term. To this no response seems to have been made, and when the case was reached in the order

of its assignment the dismissal followed. During the same term, plaintiff's counsel appeared and moved to set aside the dismissal and reinstate the case, setting up in support thereof the foregoing facts. The question we have to consider is whether the trial court erred in denying this motion for reinstatement.

We have very little hesitation in holding that the motion should have been sustained. It is true that the proceedings appear to have been unnecessarily delayed in bringing the controversy to an issue, and if the court had taken heroic measures to clear it from the docket there would be little cause of complaint; but the responsibility for such delay rests in part, at least, upon the defendant, which appears to have exercised a very fertile ingenuity in presenting successive motions which postponed the necessity of an answer. But the question where the responsibility lies for the slow rate of progress is not material here; for defendant did finally answer, and within a week thereafter the plaintiff was dismissed out of court, not because of negligence prior to the answer, but because of its failure to appear for trial. If there was any proper or sufficient excuse for that one failure, then the case should have been reinstated.

While there is no statute expressly providing that cases shall not be peremptorily assigned for trial before issue joined, such is, we think, the reasonable implication. In the first place, the provision for notice of trial by which either party may insist upon the cause being tried, save where cause is shown for granting further time, is applicable only to cases once continued, and in which an answer has been filed. Code, section 3658. In the next place, the authority given the court in section 3659 is to make an assignment of "trial causes," and it is a fair construction of the language to say that a cause is not a "trial cause" until there is an issue presented to be tried by the court or jury.

We are of the opinion that the order entered in this case before issue joined, setting it down for trial at an early date, was not within the court's proper discretion, especially where such order was made in the absence and without consent of the plaintiff. Moreover, it is the policy of the law to encourage and permit cases to be heard and decided upon their merits, in absence of fault on the part of the litigant against whom a supposed technical advantage is pressed for the defeat of such a hearing; and we are disposed to say that this case is one clearly calling for the application of the rule. We think counsel can not be fairly charged with negligence in the matter. When advised of the premature assignment of the cause for trial, they promptly called the court's attention to the situation and to the necessity for time to prepare for trial; and, in the absence of any further notice of an intention to insist upon the assignment irregularly ordered, we can not say that they were derelict in assuming that no advantage would be taken or allowed on account thereof. Plaintiff's counsel moved with promptness on learning of the dismissal, and applied for the vacation of the order before the expiration of the term. No case cited to us on either side involves a precisely similar state of facts, and none which, on principle, is inconsistent with the conclusion here announced. It is said for the appellee that plaintiff should have presented a formal motion for continuance. Knowledge of the order of assignment was not communicated to plaintiff's counsel—at least, did not reach them—until the very day for which it had been assigned. That communication was from the clerk by direction of the court, and it was both natural and proper that response thereto should be returned to the court through the same officer. It was in effect an objection to the order of assignment for the reasons stated, and, as we have already said, it was an objection which should have

2. SAME: dismissal of action: reinstatement.

been sustained. Had the assignment been made after the issue joined, plaintiff might well have been held to make formal showing for continuance; but that is not the situation with which we are now confronted.

It is unnecessary to dwell further upon the facts, which are few and undisputed. We hold that the motion made for a vacation of the order of dismissal should have been sustained, and the judgment below must therefore be reversed, and cause remanded for further proceedings not inconsistent with this opinion.—*Reversed.*

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H. D. REED, G. H. SHERWOOD, C. M. TREPAGEN, C. BISHOP, J. N. HOSIER, J. N. SHANHOLZER, F. H. REED, Stockholders in a corporation organized under the laws of Colorado, known as the Main Gulch Mining, Milling and Transportation Tunnell Company, who bring this action in their own behalf and in behalf of all stockholders similarly situated, and in behalf of said Corporation, Appellants, v. ALBERT E. HOLLINGSWORTH, OZIAS WALKER, ELMER A. JOHNSON, FRED C. McMILLAN, WILLIAM C. CATREN, and the HOLLINGSWORTH MINING COMPANY, Appellees.

**Corporations:** ACTION BY STOCKHOLDERS: CONDITION PRECEDENT: DEMAND. Stockholders of a corporation may prosecute an action on their own behalf and that of other stockholders similarly situated against the officers, directors or other stockholders, who are seeking by fraud, misfeasance or unlawful acts to do injury to the corporation or its stockholders; but as a general rule they must first demand of the managing officers that they bring the action, unless such demand would be futile, as where these officers are themselves guilty of the fraud or misfeasance charged.

**Same:** RECEIVERS: PARTIES. Ordinarily the local receiver of a corporation is the proper party to bring an action on behalf of the stockholders and demand should be made on him to do so

before the stockholders act, but if his appointment was fraudulent and a part of the scheme to defraud the stockholders no such demand is necessary; and if the property which is the subject of litigation has never come into the hands of the receiver, but has at all times remained with the corporation and its officers, the receiver is not a necessary party to the stockholders' action.

**Same: FOREIGN RECEIVERS.** The receiver of a corporation appointed 3 by a foreign court, never having been appointed in this state, can not sue or be sued here, and is not a necessary party, nor is a demand on him to bring suit necessary before the institution of an action by the stockholders; and even if a proper party, the court having jurisdiction of the other defendants, could proceed and award any appropriate relief. For like reasons the stockholders are not compelled to go into the foreign courts for leave to sue the receiver, or to secure an order for him to bring the action.

**Same: PARTIES.** The corporation is not a necessary party plaintiff 4 to a stockholders' action against the directors; and a failure to serve the corporation with notice when made a defendant is not ground for demurrer because of defect of parties.

**Same: ABATEMENT OF ACTIONS: ANOTHER ACTION PENDING.** As a 5 general rule the pendency of an action in a foreign state can not be pleaded in bar of an action in this state; and this is especially true where, as in this case, the foreign action was part of a scheme to defraud the stockholders of a corporation, and was the basis of their action against the directors.

**Injunction: RESTRAINING ACTION IN ANOTHER STATE.** Injunction will 6 lie to restrain residents of this state from prosecuting fraudulent, collusive or unlawful proceedings in the courts of another state.

**Same: JURISDICTION.** The fact that real property of a corporation 7 located in another state is incidentally involved in a stockholders' action against the directors for fraud will not deprive the courts of this state of jurisdiction.

**Pleadings: DEMURRER.** Matters of defense need not be negated in 8 the petition; and if there be a cause of action stated against any of the defendants the petition is not subject to demurrer.

*Appeal from Polk District Court.—HON. JAMES A. HOWE, Judge.*

THURSDAY, MARCH 14, 1912.

ACTION by certain stockholders in a mining corporation to set aside the declaration of forfeiture of certain contracts which the mining company had purchased from one Catren, to set aside a conveyance thereof, thereafter made by Catren, to enjoin the defendants or some of them from prosecuting certain actions against the mining company in the state of Colorado, to require them to account for the proceeds of certain ore which came into their possession, and for judgment against the defendants, and for other equitable relief. A temporary writ of injunction was issued as prayed, which was thereafter dissolved upon motion. Defendants, other than Catren, appeared and demurred to the petition. This demurrer was sustained, and judgment was entered dismissing plaintiffs' petition and taxing the costs to them. They appeal.—*Reversed*.

*Clinton L. Nourse, and Hager & Powell, for appellants.*

*Read & Read, and Guernsey, Parker & Miller, for appellees.*

DEEMER, J.—The facts must be gathered from the allegations of the petition, as the demurrer admitted all such facts as were properly pleaded. From the statements of the petition we extract the following, deemed material to a determination of the case:

The Main Gulch Company was organized in March, 1906, as a private corporation for pecuniary profit, under the laws of the state of Colorado, for the purpose of locating, purchasing, and operating mines and mining property. The principal place of business of the Main Gulch Company, as stated in the articles of incorporation, was Silver Plume, Colo.; but provision was therein made for the maintenance of offices at such other places as might be deter-

mined. . . . The affairs of the Main Gulch Company were to be managed by a board of five directors, and in April, 1908, the individual defendants, Albert E. Hollingsworth, Ozias Walker, Elmer A. Johnson, and Fred C. McMillan, and one George A. Huffman, were elected directors of that company, of whom Hollingsworth was made president; McMillan, vice-president; and Johnson, treasurer. And said persons continued as such officers and directors of the Main Gulch Company from the time of their election down to and including the times of the happening of all of the matters complained of. All of said officers resided in the state of Iowa, and most of them in the city of Des Moines, Iowa. After the organization of the Main Gulch Company, its capital stock was placed upon the market and sold to many persons, including plaintiffs; plaintiffs in that manner becoming the owners severally of shares of stock aggregating about 98,500 shares.

In March, 1906, with the approval of the probate court defendant William C. Catren, as administrator of the estate of B. C. Catren, sold, by written contract and lease, to one Chauncey I. Burt a large amount of valuable mining property described in the petition for the sum of \$35,000, and in May, 1906, Burt sold and transferred the said contract and lease to the Main Gulch Company, and conveyance of the property and assignments of the lease were duly executed by Catren, administrator, to Burt, and by Burt to the Main Gulch Company, and these conveyances and assignments duly executed were deposited in a bank in Georgetown, Colo., in escrow as provided in the contracts of sale and assignment. By the terms of the said instruments, there were to be paid to Catren, administrator, \$10,000 on or before March 31, 1907, \$10,000, on or before March 31, 1908, and \$15,000 on or before March 31, 1909. Said instruments also required that 17½ percent of all ore mined from the property should be paid to Catren, administrator, and be by him credited upon the last of the above payments of the purchase price. The Main Gulch Company immediately entered into the operation and development of said mines and mining property, and continued so down to the time of the surrender of possession of the property by Hollingsworth to Catren as hereinafter stated, and the Main Gulch Company also paid Catren,

administrator, the \$10,000 due March 31, 1907, and also 17½ per cent of the proceeds of the ore taken by it from said mines.

In February, 1908, the time for the payment of the remainder due upon said contract was, by a supplemental agreement, extended as follows: \$2,000 to be paid March 31, 1908; \$2,000, September 30, 1908; \$1,000, January 31, 1909; \$5,000, March 31, 1909; \$3,000, September 30, 1909; and the remaining \$12,000, less such sums as had been received from the 17½ per cent of the ore mined, March 31, 1910. After the extension, the Main Gulch Company paid to Catren, administrator, the \$2,000 due in March, 1908, and 17½ per cent of the proceeds of the ore meanwhile mined, so that on September 30, 1908, all of the said purchase price of the said mine had been paid except the sum of \$20,225.94, of which remaining sum the first installment was \$2,000 payable September 30, 1908.

The contracts between Catren and Burt and between Burt and the Main Gulch Company and the extension agreement between Catren and the Main Gulch Company each provide for a declaration of forfeiture, upon failure to make payments, of which ten days' written notice shall be given; but the plaintiffs and the other stockholders of the Main Gulch Company (prior to the happening of the things hereinafter stated) had no accurate information of the terms of the said contracts in relation to the forfeiture or the times when payments became due. Cognizant of the want of information of the plaintiffs and of the other stockholders of the Main Gulch Company, and just prior to the time the first remaining payment became due, September 30, 1908, the defendant Hollingsworth, president of the Main Gulch Company, had a conversation with some of the plaintiffs and other stockholders of the Main Gulch Company for the purpose of arranging for any future payments that might become due Catren, and the plaintiffs and other stockholders relied upon these statements and representations of Hollingsworth and believed that arrangements had been made or would be made by the officers of the Main Gulch Company for such remaining payments. From the time of the purchase of the property by the Main Gulch Company, down to about the 30th of September,



1908, it was represented by the individual defendants, officers of the Main Gulch Company, to various stockholders of that company, including the plaintiffs or some of them, that the said mines were producing large quantities of valuable ore, assaying in the neighborhood of \$54 per ton and in excess thereof over and above smelter and transportation charges, and the plaintiff and other stockholders were thereby led to believe, and did believe, that the property was producing such an income as would then, or in the near future, pay the indebtedness of the company to Catren and also produce a profit to them as stockholders.

No meeting of the stockholders of the Main Gulch Company was called by the defendant Hollingsworth as he had represented, or by any other person, for the purpose of arranging for any of said payments or considering the same, but on or about the said 30th day of September, 1908, the defendants Hollingsworth, Walker, Johnson, McMillan, and Catren entered into a conspiracy for the purpose of defrauding the Main Gulch Company and its stockholders, including plaintiffs, of said mines and mining property and depriving them of all their interests and rights therein, by having Catren, administrator, declare a forfeiture of the said contract and lease and thereafter sell the said property to the individual defendants for the said remainder of the consideration, \$20,225.94, due Catren, administrator, from the Main Gulch Company. In pursuance of the conspiracy, Hollingsworth went to Silver Plume, Colo., about September 30, 1908, the date the first payment fell due, and on the 3d of October, 1908, Catren, administrator, presented to Hollingsworth, at Silver Plume, a notice directed to the Main Gulch Company, stating that he, Catren, administrator, did elect to declare and did thereby declare a forfeiture of the said contracts of purchase. Upon the presentation of that notice, Hollingsworth accepted the service for the Main Gulch Company and without right and without further notice, and without the knowledge of the plaintiffs or any of the stockholders of the Main Gulch Company, other than the defendants, and without awaiting the ten days provided for by the contracts, and in violation of the terms thereof, Hollingsworth upon said notice immediately surrendered all of said mines and mining property to Catren.

On October 3, 1908, Catren, as administrator of the estate of B. C. Catren, made a report to the probate court of Clear Creek county, Colo., that he had served notice of forfeiture upon the Main Gulch Company, and that the company had surrendered possession of the mines and mining property to him; but that report was not filed in said court by Catren, administrator, nor did it become a matter of public record until about the 23d day of November, 1908. On November 30, 1908, an order was entered by said probate court in said estate, reciting that the contracts with Burt and the Main Gulch Company had been forfeited, and that the holders of said contracts had surrendered possession of the property to the administrator and authorizing the administrator to sell the said property at private sale. Immediately thereafter, and in further pursuance of said conspiracy to defraud the Main Gulch Company and its stockholders, Catren, administrator, sold all of the said mines and mining property to the individual defendants, officers of the Main Gulch Company, Hollingsworth, Walker, Johnson, and McMillan, for the sum of \$20,225.94, being the remainder of the consideration due from the Main Gulch Company to Catren, administrator, under the contracts of purchase above referred to held by the Main Gulch Company. On the 8th of December, 1908, Catren, administrator, reported said sale to the probate court, and it was confirmed by that court, and on the 9th day of December, 1908, Catren, administrator, conveyed all of said mines and mining property to the said individual defendants, Hollingsworth, Walker, Johnson, and McMillan.

On the 15th day of December, 1908, Hollingsworth, McMillan, and one E. D. Smith, an employee of Hollingsworth, organized, under the laws of Colorado, the defendant corporation, the 'Hollingsworth Mining Company' for the identical purposes for which the Main Gulch Company had been organized. The articles of incorporation of the Hollingsworth Company provide that the board of directors shall consist of five members, namely, Hollingsworth, McMillan, Smith, Walker, and Wm. C. Catren, of whom Hollingsworth shall be president, Smith, secretary, and Catren, manager of the mines; and said persons are now filling said offices. The said articles of incorporation of the Hollingsworth Company also provide that the company

shall at all times maintain an office for the transaction of business in the city of Des Moines, Iowa. On the 28th day of December, 1908, the defendants Hollingsworth, Walker, McMillan, and Johnson conveyed to the defendant Hollingsworth Company, by warranty deed, all of the said mines and mining property in question, for the following consideration: \$25,000 of the first mortgage bonds of the Hollingsworth Company, secured by a deed of trust upon the mines and mining property in question, 5,000 shares of the preferred stock of the Hollingsworth Company, and 7,475 shares of the common stock of the Hollingsworth Company, said shares being each of the par value of \$10 and constituting all of the capital stock of the Hollingsworth Company. Said stocks aggregate the face value of \$124,750, and, with said bonds, make the entire consideration, received by the defendants Hollingsworth, Walker, McMillan, and Johnson from the Hollingsworth Company \$149,750. On the same day, December 28, 1908, the Hollingsworth Company executed a deed of trust to the German-American Trust Company, upon all of said mines and mining property, to secure 50 bonds, negotiable in form and character, of the denomination of \$500 each, bearing interest at 6 percent per annum, payable December 31, 1918, which said bonds were then delivered to the defendants Hollingsworth, Walker, McMillan, and Johnson and Catren, and are now outstanding. The conveyance from Hollingsworth and others to Hollingsworth Company and the deed of trust to the German-American Trust Company, above referred to, were executed and acknowledged by Hollingsworth and Smith, as president and secretary of the Hollingsworth Company, in the city of Des Moines, Iowa.

On the ——— day of March, 1909, the defendants Johnson and McMillan instituted in the district court of Clear Creek county, Colo., an action against the Main Gulch Company to recover the sum of \$5,000 indebtedness claimed to be due them, and alleging in said suit that the Main Gulch Company was insolvent, and praying the appointment of a receiver. The only notice ever given of that suit was served upon a stockholder of the Main Gulch Company, unknown to the plaintiffs; the said stockholder so served being in collusion with the defendants in the commencement of that suit. No appearance was entered in

said suit for the Main Gulch Company, and no defense was made therein for that company by Hollingsworth as president or by any of the other defendants, officers of that company, or by any other person, although said officers all knew that said suit was to be brought and had full knowledge of the bringing thereof and its pendency, but concealed such facts from the other remaining director and from the plaintiffs and the stockholders of the Main Gulch Company, and permitted a default to be taken therein and a receiver to be appointed upon said application of Johnson and McMillan by that court, on or about April 10, 1909. Said receiver has never at any time taken or attempted to take possession of, or claimed any of, the property of the Main Gulch Company but the said property has always remained, as it was at the time said suit was commenced, in the possession and under the control of Hollingsworth Company, and said mines and mining property have been and are now being operated by the Hollingsworth Company, through its officers, the individual defendants herein.

On April 13, 1909, the defendant Hollingsworth Company instituted in the district court of Clear Creek county, Colo., a suit against the Main Gulch Company, asking to quiet the title of the Hollingsworth Company to the mines and mining property in question. Notice of said suit was served upon John B. Lucas, a stockholder of the Main Gulch Company, at Georgetown, Colo., on the 13th day of April, 1909, at 9 o'clock p. m., as said Lucas was about to leave the state of Colorado. Said latter suit, however, was commenced after notice of the instant suit had been served upon some of the individual defendants herein and after the officers of the Hollingsworth Company had knowledge and had been notified of the commencement of this suit.

The same firm of attorneys who represented Catren, administrator, in the attempt to forfeit the contracts of purchase of the Main Gulch Company, also represented Johnson and McMillan in the suit for the appointment of a receiver and also represents the Hollingsworth Company in its suit to quiet title, and said attorneys, as plaintiffs are informed and believe, represented Hollingsworth, Walker, Johnson, and McMillan in the organization of the Hollingsworth Company, and said attorneys have since, at

all times, represented the defendants in all of the proceedings relating to the said property and at the meeting of the stockholders of the Main Gulch Company hereinafter referred to.

After notice had been served of the instant suit and on the 13th day of April, 1909, a meeting of the stockholders of the Main Gulch Company was held at the instance of the defendants, officers of the Main Gulch Company, at Silver Plume, Colo. Defendants were represented at said meeting by their attorneys, being the same attorneys who appeared for the defendants in all of the proceedings hereinbefore referred to, at which meeting an election of directors was held; but the defendants by their attorneys protested said election and have declared that under the laws of the state of Colorado no proper election was had, and that said new board of directors was not entitled to act as directors and have wholly ignored said board of directors and denied their right to act, claiming that at said meeting the defendants represented a majority of all the stock of the Main Gulch Company and a majority of all the stock there present, and that said new directors had not been voted for or elected by a majority of all the stock there present. Said new board of directors has never been organized or qualified or acted for said company.

The defendants, officers of the Main Gulch Company, have always been in control of said company during all of the said transactions and have endeavored to conceal and have concealed all of said transactions from plaintiffs and the stockholders of the Main Gulch Company, other than defendants, and each and all of the said transactions above set out and referred to were had and done by the defendants in furtherance of their conspiracy to defraud plaintiffs and the other stockholders of the Main Gulch Company, and for the purpose of depriving said company and its stockholders other than the defendants of all beneficial interest in said mines and mining property. The said mines and mining property so attempted to be taken from the Main Gulch Company are worth a sum in excess of \$150,000, and are and were worth more than \$100,000 over and above all of the indebtedness and liabilities of the Main Gulch Company. The mining

property immediately adjoining the property in question has produced from \$10,000,000 to \$30,000,000.

The Hollingsworth Company, ever since its pretended purchase of said property, has been engaged in operating said mines and in taking ore therefrom and is now engaged in taking ore therefrom; said ore being of great value, and the amount thereof being now unknown to plaintiffs. . . . Plaintiffs and the other stockholders of the Main Gulch Company have, at all times, been ready and willing and are now ready and willing to do all things necessary to conserve and protect the rights of the Main Gulch Company in and to said property and the said Catren contracts and to do equity in the premises. The articles of incorporation of the Main Gulch Company make no provision for the calling of special meetings of the stockholders thereof.

Plaintiffs in their petition pray for themselves, and other stockholders of the Main Gulch Company: That the pretended declaration of forfeiture above referred to be declared void, that the defendants Hollingsworth, Walker, Johnson, McMillan, and Catren, and the Hollingsworth Mining Company, be decreed to hold said mines and mining property and all parts thereof and the proceeds therefrom as trustees for the benefit of the Main Gulch Company and its stockholders. That they be required to account for said property and each and every parcel thereof and for all ore taken from said mines, and that, if any of the said property has been disposed of or expended or destroyed, that judgment be rendered against defendants for the full value thereof. That a temporary injunction issue to restrain the Hollingsworth Company and its officers and the individual defendants from prosecuting said suits and from instituting and prosecuting further suits, and for general equitable relief. And in the alternative plaintiffs pray judgment against all of the defendants except the Main Gulch Company, for damages suffered, to the sum of \$150,000 and interest.

As already indicated, while Catren was made a party to the proceedings, he was not served with notice, and it also appears that neither the Main Gulch Company nor its receiver were served with notice, nor was the receiver

made a party. The main points made by defendants in their demurrer were that:

(1) Plaintiffs have no right to sue, for the reason that a receiver had been appointed for the Main Gulch Company in the state of Colorado, and he alone could bring the suit.

(2) The receiver was a necessary and indispensable party to this action.

(3) The plaintiffs have no right to sue in their capacity as stockholders for the reason it does not appear that they had made any demand upon the corporation, its officers or directors, to bring the action before commencing this proceeding, and for the further reason that they made no demand upon the receiver to bring suit.

(4) The receivership proceedings pending in Colorado are a bar to plaintiffs' action.

(5) This action should be abated because of the pendency of the proceedings in the Colorado courts.

(6) The courts of this state are without jurisdiction for the reason that the action involves and is brought to recover an interest in real estate situated in a foreign jurisdiction.

(7) The matters complained of relate to the internal management of a foreign corporation, and the courts of this state have no jurisdiction to interfere therewith.

(8) Plaintiffs have not shown any wrongs to themselves individually and are not in a representative capacity entitled to any relief.

(9) Plaintiffs are not entitled to any relief for the reason that they have not offered to repay defendants for money expended by them and do not offer to do equity, and for the further reason that the Main Gulch Company is shown to be insolvent, and no allegations are made which show, or tend to show, that there would be any surplus to the stockholders after the corporate debts were paid. This



demurrer was sustained generally, and the appeal is from this ruling.

If the demurrer was properly sustained, this, of course, ends the case; but, if error be found in that rule, then it becomes important to determine the correctness of the ruling on the motion to dissolve the temporary writ of injunction.

I. Plaintiffs are not only suing on their own behalf, but for the benefit of all the other stockholders similarly situated, and the action is not to preserve or secure

their individual rights, save as they may be incidentally involved after recovery may be had from the defendants, for and on behalf of all the stockholders. Proper preliminary steps having been taken or good reason shown why these would have been unavailing, the law authorizes such suits to be prosecuted against the officers, directors, or stockholders who by fraud, misfeasance, or unlawful acts do injury to the corporation itself or to the stockholders. As a rule demand must be made upon the managing officers to bring such action before it can be prosecuted by the individual stockholders. *Schoening v. Schwenk*, 112 Iowa, 733; *Telegraph v. Lee*, 125 Iowa, 17. But where these officers are themselves guilty of fraud, and misfeasance is charged, it is apparent that demand upon them to bring suit against themselves would be a vain and useless thing, and in such cases no demand is necessary. See cases just cited, and *Delaware Co. v. Albany R. R.*, 213 U. S. 435 (29 Sup. Ct. 540, 53 L. Ed. 862), and 2 Morawetz on Corporations (4th Ed.) section 741. It is not necessary, of course, to make demand upon the other stockholders, for they have nothing to do with the immediate management of the affairs of the company and could not have brought it even were they so disposed. *Brewer v. Boston Theatre*, 104 Mass. 378; *Railway Co. v. Alling*, 99 U. S. 463 (25 L. Ed.

1. CORPORATIONS:  
action by  
stockholders:  
condition pre-  
cedent:  
demand.



438); *Delaware Co. v. Albany R. R.*, 213 U. S. 435 (29 Sup. Ct. 540, 53 L. Ed. 862).

According to defendants' own theory the property of the corporation was in the hands of a receiver, and they could not have brought suit as directors or managers, even had they been so disposed. Ordinarily  
 2. SAME: receivers: parties. a local receiver would be the proper party to bring the suit, and demand would doubtless have to be made upon him before action would lie by the stockholders; but it is charged in this petition that the suit which resulted in his appointment was covinous and fraudulent and a part of the scheme whereby the Main Gulch Company and its stockholders were to be defrauded. In such cases no demand would be necessary upon the receiver. *Brinckerhoff v. Bostwick*, 88 N. Y. 60; *Sigwald v. City Bank*, 82 S. C. 382 (64 S. E. 399); *South Spring Hill Co. v. Amador Co.*, 145 U. S. 300 (12 Sup. Ct. 921, 36 L. Ed. 712).

Moreover it is alleged that the property which is the subject-matter of the litigation has never been in the hands of the receiver, but has at all times, since the acts complained of, been in the possession of the defendants. In such cases it is not necessary to make the receiver a party. *Sigwald v. Bank*, *supra*; *State Bank v. McElroy*, 106 Iowa, 260; *Weigen v. Insurance Co.*, 104 Iowa, 411.

Moreover, as the receiver was appointed by a foreign court and has never been appointed in Iowa, he (as a general rule) would have no standing in this court under the doctrine announced in *Parker v. Lamb*,  
 3. SAME: foreign receivers. 99 Iowa, 265; *Wyman v. Eaton*, 107 Iowa, 214, and other like cases: *Schloss v. Surety Co.*, 149 Iowa, 382. This is the rule announced by the United States Supreme Court in *Booth v. Clark*, 17 How. 322 (15 L. Ed. 164), and steadfastly adhered to down to this time. Of course, authorities, and many of them, hold to a contrary doctrine, but we are not disposed to

depart from the rule so often established and so well fortified by authority.

The receiver here appointed could neither sue or be sued in the courts of this state, for his appointment had no extraterritorial effect. He was not then a necessary party, nor was it necessary to make demand upon him to bring the action.

II. Even if the receiver were a proper party, he was not an indispensable one, and the court, having jurisdiction of the other defendants, could proceed and award any appropriate relief. *Hazard v. Durant* (C. C.) 19 Fed. 476; *Teager v. Landsley*, 69 Iowa, 725.

III. For the same reasons plaintiffs were not required to go to the Colorado courts for leave to sue the receiver or to secure an order upon him to bring the action.

IV. The Main Gulch Company was not a necessary party plaintiff. This action is brought by the stockholders of the company for and on behalf of all stockholders, and in

4. SAME: parties. a sense the Main Gulch Company is a party. Indeed, if recovery be had, it will be for the company, although brought by the stockholders and not by the managing directors in the name of the company. Granted the right of plaintiffs to sue in their names as stockholders, it follows that the corporation itself was not an indispensable party plaintiff. Whether or not it should have been made a party defendant is another question, and one which does not properly arise upon the demurrer. The Main Gulch Company was made a party defendant by an amendment to the petition filed before the demurrer was interposed, and whilst it was not served with notice of the amendment or of the original petition, yet as it was made a party, the petition and its amendment are not subject to demurrer because of defect of parties. This is expressly held in *Forbes v. Delashmutt, et al.*, 68 Iowa, 164. See, also, to the same effect

*Danner v. Hotz*, 74 Iowa, 390. Doubtless no relief can be had in favor of the corporation itself until service had upon the corporation, under the rules announced in the cases cited in Cook on Stocks and Stockholders (3d Ed.), section 738. But this is not true as to all the relief asked, nor may the questions be raised by demurrer to the petition.

V. The pendency of the proceedings in the state of Colorado can not be pleaded in bar, or in abatement of this action for the reason: (1) It is alleged that these

5. SAME: abatement of actions: another action pending. entire proceedings were and are part of the scheme to defraud and are covinous and wrongful in character. (2) As a general rule, an action pending in the courts of another

jurisdiction can not be pleaded in bar or in abatement of our action in this state. See, in support of these propositions: *Sigwald v. Bank*, *supra*; *State Bank v. McElroy*, *supra*; *Weigen v. Ins. Co.*, *supra*; *Allen v. R. R. Co.*, 42 Iowa, 687; *MacGregor v. MacGregor*, 9 Iowa, 78; *Merritt v. Barge Co.*, 79 Fed. 228 (24 C. C. A. 530); *Schmidt v. Posner*, 130 Iowa, 347 (106 N. W. 760); *Conrad v. Buck*, 21 W. Va. 396; *Davis v. Morris' Ex'rs*, 76 Va. 21.

VI. It is the rule of this jurisdiction that an injunction will lie to restrain residents of this state from prosecuting fraudulent, collusive, or unlawful proceedings in the courts of another jurisdiction. *Ayres v.*

6. INJUNCTION: restraining action in another state. *Siebel*, 82 Iowa, 347; *Parker v. Lamb*, 99 Iowa, 265; *Teager v. Landsley*, 69 Iowa, 725; *Hager v. Adams*, 70 Iowa, 746. See, also,

the following cases from other jurisdictions: *Brown v. Silver Mining Co.* (C. C.) 55 Fed. 7; *Dunbar v. Am. Telephone*, 224 Ill. 9 (79 N. E. 429, 115 Am. St. Rep. 132, 8 Ann. Cas. 57); *Bigelow v. Calumet Co.* (C. C.) 155 Fed. 879; High on Injunctions (4th Ed.) section 1227.

VII. The action is not *in rem*, but *in personam*, and the mere fact that some of the property incidentally involved is real property, situated in another jurisdiction, does not deprive our local courts of jurisdiction over persons here resident, who are charged with a violation of some duty of trust. *Hinkley v. Sac Oil Co.*, 132 Iowa, 396; *Brown v. Silver Mining Co.*, *supra*; and the *Teager and Hager* cases, heretofore cited.

VIII. Lastly, it is contended that it does not appear that the Main Gulch Company is solvent, or that plaintiffs have an interest in the matter because of no showing that anything would remain to them after the corporation had paid its debts; that plaintiffs do not offer to do equity in the premises; that a new board of directors has been elected for the Main Gulch Company since the commencement of the action, or perhaps before; and that it does not appear that they have not ratified the alleged illegal acts. None of these propositions have merit. They either appear from the allegations of the petition, or are defensive matters not necessary to be negatived in the petition. No question as to misjoinder of causes of action or of parties is made, and, if there be any cause of action stated in the pleadings against any of the defendants, the demurrer should have been overruled.

The petition does state at least one cause of action against all the defendants, and doubtless more than one, and we are constrained to hold that the demurrer to the petition should not have been sustained, and that under the allegations of the petition the motion to dissolve the temporary writ of injunction should have been overruled.

It follows that the orders and judgments must be, and they are—*Reversed*.

STATE OF IOWA, v. JOHN WARNER, Appellant.

**Criminal law: EVIDENCE: IMPEACHMENT OF WITNESSES.** Where the  
1 defendant in a criminal action calls one of the witnesses examined by the state and makes him his own witness, he becomes subject to impeachment on rebuttal the same as any other witness for the defendant.

**Same: *Res gestae*.** The statements of a third person regarding  
2 the circumstances of an affray made to a physician when calling him to attend the injured person are admissible as part of the *res gestae*.

**Same: EVIDENCE: INSTRUCTIONS: HARMLESS ERROR.** Where a witness  
3 for defendant testified that neither he nor defendant had been drinking on the day of the accident and were not intoxicated at the time, evidence of the condition of the witness when calling a physician shortly afterward and of statements regarding their drinking, when limited to the question of intoxication of the witness, was not prejudicial. And where the court charged that the evidence could only be considered on the question of whether the witness was intoxicated at the time of the accident, refusal to charge that it could not be considered as proving that defendant was shooting at decedent's hat when he was injured was not erroneous; especially as it will be assumed that the jury followed the instruction.

**Same: MANSLAUGHTER: NEGLIGENT USE OF DANGEROUS WEAPONS: IN-**  
4 **STRUCTIONS.** The use of deadly and dangerous weapons in a careless and reckless manner is such gross negligence as makes the act criminal, and if the act results in the death of another the accused is guilty of manslaughter. Under the evidence in this case it is held that the court correctly defined and submitted the issue of manslaughter, growing out of the negligent use of a dangerous weapon.

*Appeal from Van Buren District Court.*—HON. C. W.  
VERMILLION, Judge.

SATURDAY, SEPTEMBER 21, 1912.

DEFENDANT was indicted for the crime of manslaughter, due to the reckless and careless use of a deadly weapon. Upon trial to a jury he was convicted of the crime charged and appeals.—*Affirmed.*

*J. C. Mitchell and Walker & McBeth*, for appellant.

*George Cosson*, Attorney General and *John Fletcher*, Assistant Attorney General, for the State.

DEEMER, J.—On the afternoon of Sunday, May 7, 1911, defendant, with William Gillespie and one other, went from the town of Bentonsport to a shed at the railway stockyards in said town and there found five other men playing poker, among whom was the deceased, Howard Runyon. The men were about a car door lying across some logs. Defendant was carrying a twenty-two caliber rifle with him, and when he arrived he said to deceased, "Bunny" (meaning the deceased), "let me shoot at your hat." Deceased took off his hat and threw it some feet distant and southward from where he was sitting, evidently in response to the request. At any rate, defendant immediately shot at it several times, amidst laughter from the crowd, and finally deceased went and got it, remarking to defendant, "Are you satisfied?" Having regained his hat, he went back to his place and resumed the game. In a few minutes defendant again discharged his gun, this time in the direction of Runyon; the ball puncturing his (Runyon's) skull, resulting in death in a few hours. Just before the shot was fired, some one in the party, observing that defendant was pointing his gun in the direction of the deceased, cried out, "Look out Bunny, he is going to shoot." Immediately the fatal shot was fired.

The state does not claim that the shooting was intentional, but insists that it was done with such reckless disregard of human life as to constitute involuntary man-

slaughter. On the other hand, it is contended for defendant that the shooting was wholly accidental, and that no crime was committed. Testimony was adduced tending to show that the accused either deliberately aimed at the hat which deceased had replaced upon his head, thinking that he was expert enough to puncture it without injuring deceased, or that he was aiming at some nail or imaginary mark just over the head of the deceased and by reason of bad marksmanship or through some factitious circumstance hit the deceased in the head instead of the mark which he had selected. Immediately after the shooting, defendant remarked, "If they had kept their mouths shut, it would not have happened," having in mind, no doubt, the cry of warning made to deceased by one of the bystanders. His claim at the trial was that he was shooting at a certain nail head the range of which was but a short distance over the head of the deceased as he was sitting in a crouched position over the improvised table while the cards were being dealt, and that hearing the warning cry he (deceased) raised his head and body so that his head came within range, and thus received the wound from which he died. Learned counsel for appellant recognize that the case made for the state was for a jury and that there is abundant testimony to support the verdict; and we may, with propriety, add that the only excuse which can be offered is that all interested parties were more or less intoxicated and all more or less engaged in illegal acts. But neither of these things palliate, much less excuse, the act. According to defendant's own testimony, he was aiming at and intending to shoot at a small mark so nearly in range with Runyon's head that by raising it a few inches he brought it into such position as to receive the ball. It is said that defendant was an expert marksman and might reasonably have supposed that he could imitate William Tell; but we doubt if an expert

would undertake any such hazardous performance, and his excuse is far from Tellian in character.

The real points relied upon for a reversal revolve around three propositions: First, it is contended the court erred in the admission of testimony; second, that it erred in giving certain instructions and refusing certain others with reference to what constitutes involuntary manslaughter; and, third, that it erred in giving an instruction to the jury after it had been out for some hours with reference to its duty in the premises.

I. William Gillespie was a witness for the state and was examined fully regarding the circumstances attending the shooting. He was also called by defendant as a witness on his behalf after the state had rested, who had him testify as to his meeting him (defendant) about eleven o'clock in the morning of the day of the homicide and of what occurred from that time down to the time of the shooting. One of the objects of this was to show that defendant was not intoxicated at the time of the shooting. Indeed, he testified in chief directly that defendant did not drink anything from eleven o'clock a. m. until the time the fatal shot was fired, and that neither he nor the defendant had been drinking or were intoxicated, that day. On cross-examination he was asked the following questions, to which he made the answers indicated:

I went after Dr. Schee. I had some conversation with him. Q. I will ask you whether or not the doctor said this to you and you then said in reply, 'You fellows have been boozing some down there today,' and you said, 'Well, not very much.' A. No, sir. Q. You did not say that to Dr. Schee? A. No, sir; I did not say it. Q. I will ask you whether or not you stated to the doctor, at that time, and as a part of that conversation, something like this: 'This thing of shooting at a man's hat when on his head is not right.' A. No, sir; I did not say that. Q. And isn't it a fact that the doctor said to you, 'Did Warner



shoot at the hat when on his head?' and you replied, 'Yes, sir; he did.' (Same objection as before.) The Court: I think I will sustain the objection as to this last question. The objection to the question asked of this witness as to what he said to Dr. Schee concerning the shooting of the hat is sustained and withdrawn from the consideration of the jury, and they are not to consider it for any purpose.

The doctor referred to in this record was in due season called as a witness by the state in rebuttal, and the following record was made:

Will Gillespie came for me on the day Howard Runyon was shot. Q. What would you say to his condition, as to whether or not he was intoxicated or otherwise? A. Well, I would not say that he was badly intoxicated, but I would say that in my opinion he had been drinking. To a certain extent he was under the influence of liquor. Q. I will ask you to state whether or not you said something to him like this, 'You fellows have been boozing down there some to-day,' and he replied, 'Well, not very much.' A. I asked that in the form of a question. I think I said, 'Haven't you?' Q. And what did he say? (Same objection and ruling as last above. Excepted to.) A. 'Well, not very much.' (The witness was then cross-examined by defendant's counsel and the following elicited): 'Among other things, he said that Bunny Runyon had been shot or scalped down at the stockyards by John Warner, and he wanted me to go down and tend him. He said it in a very clear, intelligent way, so that I understood it very plainly. He said it just as clearly and as plainly as a sober man would say it. He was somewhat excited and seemed alarmed.

On redirect the following record was made:

Q. You say that when Gillespie came up there he says, 'Bunny Runyon has been scalped, and I want you to go down there'? A. I think he said 'had been scalped by John Warner shooting with the rifle.' Q. Was that all he said? A. No, sir. Q. What else did he say? (Defendant objects to that. We did not call for it.) The

Court: It may go in as bearing on Gillespie's condition at the time. (The ruling of the court is excepted to.) Defendant's Attorney: We object to anything else that was said as not rebuttal and hearsay. The Court: Same ruling. (Same exception.) A. He said, 'This thing of shooting at a man's hat when it is on his head ain't right.' Defendant's Attorney: We move to strike out the answer as not rebuttal. The Court: The evidence is received only as it may bear on Gillespie's condition at the time, and not as any contradiction of Gillespie's testimony to be inferred from the alleged statement, but only bearing, if it does, on Gillespie's condition at the time the statement was made. (To which ruling of the Court the defendant excepts.) Q. Was anything else said by you to Mr. Gillespie? A. Yes, sir; I made the reply to that statement, but if that is overruled— (Defendant objects for the same reason as before.) The Court: I don't see how it is material. He may answer. (To which ruling the defendant excepts.) A. He made that statement that I have just repeated, and I said, 'Did Warner shoot at the hat when it was on his head?' A. Yes, sir. Defendant's Attorney: We move to strike out the last answer as incompetent, immaterial, hearsay, and not rebuttal. The Court: Overruled, but the evidence is only introduced, as bearing, if it does, on Gillespie's condition of intoxication or otherwise at the time, but it is not to be considered for any other purpose whatever. (To which ruling defendant excepts.) ,

Except as shown, each and all the questions put to this witness on his direct or redirect examination were objected to by defendant's counsel upon every conceivable ground. The chief argument now made is that the state should not have been permitted to impeach its own witness and should not have been allowed, under the guise of rebutting the defendant's case, to put into the record hearsay and incompetent testimony. There is nothing in the first of these contentions. Defendant made Gillespie his own witness and elicited from him certain evidence which had not been called for or inquired into when the witness was

I. CRIMINAL LAW:  
evidence: im-  
peachment of  
witnesses.

upon the stand for the state. Having done so, the witness was subject to impeachment the same as any other witness, and it was entirely competent for the state to show by declarations of Gillespie that both he and defendant were intoxicated or had been drinking on the day in question. *Hall v. Manson*, 99 Iowa, 698.

There is more trouble with that part of the testimony relating to what Gillespie said regarding how the shooting occurred. We are satisfied, however, that what the witness said to the doctor explanatory of his call upon him in a professional capacity to go to the wounded man was part of the *res gestae* and admissible as such. *State v. Cross*, 68 Iowa, 180.

The last question propounded to the witness and his answer thereto present even greater difficulty. It was manifestly not received as showing contradictory statements made by the witness, for the court did not allow the foundation to be laid for that kind of impeachment. Indeed, we do not have to indulge in surmises, for the court expressly said that the testimony was admitted for no other purpose than as bearing upon Gillespie's condition as to intoxication. In addition to stating at the time the object and purpose of the testimony, the court gave the following instruction with reference to the matter:

3. SAME: evidence: instructions: harmless error.

(14) Evidence has been admitted tending to show alleged statements of the witness Gillespie to Dr. Schee concerning the manner of the shooting. This evidence is to be considered only as bearing, if it does, upon the question of whether said Gillespie was intoxicated, and is not to be considered for any other purpose or as tending in any way to prove the manner of said shooting. Evidence tending to show that the witness Gillespie had made statements to Dr. Schee in reference to the alleged drinking of intoxicating liquor by said Gillespie or the defendant on the day of the shooting is not to be considered as any evidence of the alleged fact, but only as bearing, if

it does, on the credit to which the witness Gillespie is entitled.

With reference to this matter the defendant's counsel asked the following instruction: "No. 6. You are instructed that you can not and must not consider the testimony of Dr. Schee, in reference to what the witness Gillespie may have said as to the shooting at the hat while on the head of the deceased, as at all proving or tending to prove that defendant was so shooting at the hat when the deceased was struck. That testimony of Dr. Schee does not tend to prove any such matter." This was refused. In so far as the instructions go, there is little difference between the one given by the court and this. The one given says that the testimony should be considered for but one purpose, and not then unless it bore thereon, and expressly declared that it should not be considered as tending in any way to prove the manner of the shooting. It more closely limited the application of the testimony than the one asked by the defendant, and expressly said that the testimony was to be considered only as bearing, if it does, upon the question of Gillespie's intoxication. In this connection it is well to remark that we do not see any logical connection between the remark and witness' intoxication, save on the possible theory that, having denied part of the conversation, he must have been so drunk that he did not know what he had said to the doctor when he went after him. But if it had no logical bearing upon that proposition, we do not see how defendant was prejudiced, for the jury was expressly told that the testimony should not be considered for any other purpose and especially advised that it had no bearing upon the manner of the shooting.

We must assume that the jury followed the instruction, and with that assumption no prejudice could possibly have resulted.

II. The state rested its case entirely upon the theory that

the offense was one of involuntary manslaughter, and the court in adopting this theory gave the following, among other, instructions:

(3) The material averments of the indictment are that the defendant did, at the time and place therein alleged, handle the rifle therein described in a careless and reckless manner, and while so doing did unlawfully, carelessly, and recklessly shoot Howard Runyon in the head, thereby causing the death of said Runyon.

4. SAME: manslaughter: negligent use of dangerous weapons: instructions.

(4) Manslaughter is the unlawful killing of one human being by another without deliberation, premeditation, or malice, as where one engaged in an unlawful act, not amounting to a felony, unintentionally kills another; or, if one recklessly and heedlessly fires a gun and thereby kills another, he will not be excused, but his offense will be manslaughter, though the weapon was pointed in the direction of the deceased by accident with no design to wound or kill.

(5) The defendant in handling a deadly and dangerous weapon was bound to exercise such care as an ordinarily careful and prudent man would ordinarily exercise under like circumstances, and if he failed to do so he was guilty of negligence. He was not required to exercise the highest degree of care, but only such care as a reasonably prudent man should and ought to use under like circumstances. If he did so, then the killing of deceased would be excusable, and he should be acquitted; but if you find from the evidence beyond a reasonable doubt that he failed to exercise such degree of care and that he was guilty of negligently and recklessly using such weapon, whereby the deceased was shot and killed, such killing would be manslaughter.

(6) If you find from the evidence beyond a reasonable doubt that at the time and place alleged in the indictment the defendant was intending to shoot through the hat of deceased while the same was on his head, and that in so doing he was using a deadly and dangerous weapon recklessly, carelessly, and negligently, or so find that in aiming at or shooting at a nail head, if he was, defendant was shooting so close to deceased as that his act

in so doing was a negligent, careless, and reckless use of a deadly weapon and that by reason of such reckless and negligent use of such weapon said Runyon was shot and killed, such killing would be manslaughter.

(7) If you find that at the time he fired the fatal shot the defendant was aiming at a nail head, but further find from the evidence beyond a reasonable doubt that in so doing he recklessly pointed said gun so close to the deceased and fired the same under such circumstances as that he was not, in so doing, in the exercise of such care as an ordinarily careful and prudent man would exercise under the circumstances, and thereby the deceased was shot and killed, such killing would be manslaughter.

(8) Unless you find from the evidence beyond a reasonable doubt that defendant's use of said gun at the time of the shooting was negligent and reckless, you should acquit him.

(9) If you find from the evidence beyond a reasonable doubt that the defendant negligently, carelessly, and recklessly, discharged the gun in question and thereby shot and killed the deceased, then the fact, if it be a fact, that the deceased moved or raised his head at the time or just prior to the firing of the shot, and that such act contributed to his death, if it did, would constitute no defense.

(11) Negligence is the lack of such care as an ordinarily careful man would exercise under like circumstances. It is a relative term, and whether or not an act is negligent depends upon all the circumstances and conditions surrounding and attending the act. In determining whether or not the defendant was negligent in his use of the gun in question, you should consider all the facts and circumstances surrounding him at the time: where he aimed or pointed the gun, and how close to the deceased the same was aimed or pointed; whether, to his knowledge, the deceased was aware that he was about to discharge the gun; whether he should, in the exercise of ordinary care, have anticipated that deceased might move or come in range of said gun; his skill or lack of skill with firearms; the character of the gun in question as known to him, and the familiarity of defendant with said gun or his lack of it; his condition as to intoxication or

otherwise, and any and all other facts and circumstances in evidence that may aid you in determining the question, bearing in mind that he was bound to exercise such degree of care as an ordinarily careful and prudent man would exercise in like circumstances, and no more.

In opposition to these, defendant asked the following:

No. 1. If you find at the time the defendant, when he fired the shot in question, was shooting at a mark and not intending or anticipating injury to the deceased, or to any one else, before you can find him guilty as charged, you must find that he was grossly negligent; that is, that he was guilty of gross negligence. And you are instructed that by the term 'gross negligence' is meant the failure to exercise slight care.

No. 3. You are instructed that by the term 'gross negligence' is meant such absence of care as to evince or indicate that there was an indifference to the consequences or the rights of others.

No. 7. And you are further instructed that by the term 'gross negligence' is meant the want of slight diligence, or, what is the same, the want of that care which every man of common sense, however, inattentive, takes of his own property; that is, by the term 'gross negligence' is meant exceeding negligence.

Considerable difficulty has been experienced by the courts in stating rules with reference to homicide growing out of the negligent use of dangerous weapons. And there has also been much difficulty in the use of the terms "slight," "ordinary," and "gross" negligence. Some courts have entirely abandoned the use thereof and made each case to depend upon its peculiar circumstances. Whether or not a given act is careless and reckless depends primarily upon the circumstances and is always a question for the jury, and yet there must be some guide whereby to determine whether the act is criminal or merely a misadventure for which there may be civil liability. If at the time defendant was guilty of some act *malum in se* from which death results, he is guilty of manslaughter as a



matter of course, and some have gone to the extent of applying the same rule if the act be *malum prohibitum*. But others have held the rule to apply if the act is a misdemeanor prohibited by statute or ordinance. We need not stop here to say what the rule should be for this state, for the case was not submitted upon that theory. The state relied upon the rule applicable to the negligent use of deadly or dangerous weapons without reference to statutory or other prohibitions, and the court adopted that theory of the case. From this angle we do not have to consider whether defendant's act amounted to an assault for the consequences of which he should be held responsible, but rather whether or not the court correctly laid down the law with reference to the negligent use of a deadly weapon. Involuntary manslaughter may be committed in many ways, and the law is so solicitous of human life that it considers as unlawful all acts which are dangerous to the person against whom they are directed, and not justified by the occasion, no matter how innocently they may have been performed. A distinction is here drawn between the use of a deadly and dangerous weapon and other careless and negligent acts not necessarily involving life or bodily harm.

In *State v. Benham*, 23 Iowa, 154, we said (opinion by Dillon, J.):

If the jury should believe that the defendant discharged the gun intentionally, the above sufficiently refers to the legal principles upon which the plea of self-defense must rest. But, suppose the jury shall believe that the gun was not intentionally discharged by the defendant, what is then the law of the case? It is this: Accidental death, wholly to be excused from all guilt, must be caused in the doing of some lawful act. The law, in its solicitous regard for human life, requires all reasonable and due caution in the use of dangerous articles or instruments. If one in doing a lawful act without any intention of bodily harm, and using proper precaution to prevent dan-



ger, unfortunately happens to kill another, the law excuses the killing. Fost. 258; 1 East, P. C. chapter 5, section 40, page 266; Id., chapter 5, sections 8, 36; 1 Russell on Crimes, 657, 658; Whart. Cr. L. (2d Ed.) 382, 385. If therefore the defendant pointed a loaded gun at the deceased, under circumstances which would not have justified him in shooting the deceased, and the deceased seized it and struggled for it to save himself from the menaced injury from it, and in the struggle it went off without being purposely shot off by the defendant, the latter could not claim that the homicide was excusable. It would be manslaughter; and the circumstances relied on wholly to excuse the defendant would be regarded by the court in fixing the amount of punishment. The converse of the last proposition would, of course, be true, viz., that if the defendant pointed a loaded gun at the deceased and 'it went off,' under circumstances in which it would have been lawful to have shot it off, the defendant would be regarded by the laws as being guilty of no offense.

Again, in *State v. Vance*, 17 Iowa, 138, Wright, J., speaking for the court, said:

If one fires a gun recklessly or heedlessly, he will not be excused; and his offense will be at least manslaughter, though the weapon was pointed in the range of the deceased by accident, with no design or intention to wound or kill. If the act is attended with probable mortally dangerous consequences to the deceased, or persons generally, and death should ensue, the crime is murder or manslaughter, depending upon the degree of deliberation. The law always presumes that a party intended the probable and natural effect of his deliberate act; and when, therefore, the killing is deliberate, malice is presumed, and the crime is murder, unless sufficient excuse or provocation is shown. A homicide (amounting to murder or manslaughter, according to circumstances) may be committed, in opposing even an unlawful effort to carry away property. The owner may resist the taking, but not to the taking of life. And, as a party could not, in any emergency, lawfully employ a deadly weapon for such purpose, neither could he, it would seem, use it in the

form of a threat, as to frighten or drive away those committing the waste. It is certainly sure that if death should ensue from the carelessness of the party, in thus attempting to frighten the depredator, he would not be excused, though he had no intention of wounding or killing any one. We remark, in conclusion, in this part of the case, that a person, in the commission of a crime, may determine to do the wrong, or act with such indifference as almost, if not quite, 'supply the place of the more positive mental condition.' Applying this proposition, thus briefly stated, to cases of homicide, and the rule is that every act of gross carelessness, even in the performance of what is lawful, and *a fortiori* of what is not lawful, and every negligent omission of a legal duty, whereby death ensues, is indictable either as murder or manslaughter. *Rex v. Carr*, 8 C. & Payne, 163; 2 Archb. 9; *U. S. v. Freeman*, 4 Mason, 505 (Fed. Cas. No. 15,162). In the light of these principles, we need no more than say that the first instruction asked by defendant was properly refused. For, according to that, to constitute the offense (of manslaughter), the killing must have been the result of an intentional, unlawful purpose or act, against the deceased or some other person.

Again, in *State v. Hardie*, 47 Iowa, 647, we said:

The court instructed the jury as follows: '(5) And on the charge of manslaughter, I instruct you that if the defendant used a dangerous and deadly weapon, in a careless and reckless manner, by reason of which instrument so used he killed the deceased, then he is guilty of manslaughter, although no harm was in fact intended.' Other instructions of like import were given, and the question of criminal carelessness was submitted to the jury, as follows: '(8) And in this case I submit to you to find the facts of recklessness and carelessness under the evidence, and if you find that the death of the party was occasioned through recklessness and carelessness of the defendant, then you should convict him, and if not you should acquit. And by this I do not mean that defendant is to be held to the highest degree of care and prudence in handling a dangerous and deadly weapon, but only such care as a reasonably prudent man should and ought to use under like cir-

cumstances, and if he did not use such care he should be convicted, otherwise he should be acquitted.' There can be no doubt that the instructions given by the court embody the correct rule as to criminal carelessness in the use of a deadly weapon. Counsel for defendant insist that the instructions of the court do not go far enough, and upon the trial asked that the court give to the jury the following instructions: '3. Although the deceased came to her death from the discharge of a pistol in the hands of the defendant, yet if the defendant had good reason to believe, and did believe, that the pistol which caused her death was not in any manner dangerous, but was entirely harmless, and if he did nothing more than a man of ordinary prudence and caution might have done under like circumstances, then the jury should find him not criminally liable and should acquit.' This instruction and others of like import were refused by the court, and we think the ruling was correct. That the revolver was in fact a deadly weapon is conclusively shown by the terrible tragedy consequent upon defendant's act in firing it off. If it had been in fact unloaded, no homicide would have resulted, but that defendant would have been justly censurable for a most reckless and imprudent act in frightening a woman by pretending that it was loaded, and that he was about to discharge it at her. No jury would be warranted in finding that men of ordinary prudence so conduct themselves. On the contrary, such conduct is grossly reckless and reprehensible, and without palliation or excuse. Human life is not to be sported with by the use of firearms, even though the person using them may have good reason to believe that the weapon used is not loaded, or that, being loaded, it will do no injury. When persons engage in such reckless sport, they should be held liable for the consequences of their acts. (See, also, *State v. Tippet*, 94 Iowa, 646; *State v. Moore*, 129 Iowa, 514).

In view of the testimony as to the use of the weapon, we think the instructions given by the trial court were correct, and that there was no error in refusing defendant's request. In other words, it was not necessary for the state to show that the defendant was guilty of gross

negligence in the use of the weapon. Perhaps it would be as well to say that the use of a deadly and dangerous weapon in a careless and reckless manner is such gross negligence as makes the act criminal. Without referring to authorities from other states, it is sufficient to say that the opinions from which we have quoted seem to sustain the instructions given.

III. The last instruction of which complaint is made is very like the one considered in *Armstrong v. James*, 155 Iowa, 562, and need not be set out in full. It is not so strong as the one given in that case and in many of the others cited in that opinion. Following the rule of those cases, we conclude there was no error here.

Finding no reversible error, the judgment must be, and it is—*Affirmed*.

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#### STATE OF IOWA v. GUY BAKER, Appellant.

**Criminal law: JURORS: COMPETENCY: WAIVER OF OBJECTION.** The

1 mere fact that a defendant in a criminal case may have talked with one of the jurors who was confined in the jail with him would not render the juror incompetent, unless he received some information or impressions tending to bias his judgment and prejudice him against the accused; and if such was the fact and it was discovered during the trial, it was the duty of the defendant to make the objection then, rather than speculate on a favorable verdict and in the event of disappointment insist upon the juror's incompetency as the basis of a motion for new trial.

**Same.** The fact that after the jury had agreed upon a verdict of

2 guilty and were waiting for the judge to deliver the same to him, one of the jurors suggested that defendant was of the same name as a person reported to have committed a previous murder, was not ground for new trial, in the absence of evidence that any juror was influenced by the suggestion, or that the verdict as prepared would have been repudiated by any member of the panel.

**Same: EVIDENCE: PHOTOGRAPHS.** Photographs of the surroundings of

3 the place where a crime was committed are admissible in evidence, when the surroundings are material; and although the photographer was permitted to speak of a certain point in connection with the

photograph as the place where the crime was committed, it was not prejudicial to the defendant, where it was conceded that he had no personal knowledge of the fact and it was clear from his testimony that he referred simply to the place as pointed out to him.

**Same:** EVIDENCE OF REPUTATION: COMPETENCY OF WITNESS. Witnesses  
4 acquainted with the reputation of a defendant for truth and veracity in his own neighborhood may testify to the same, although they may reside elsewhere; the fact that they reside elsewhere going simply to the weight to be given their evidence.

**Same:** EXPERT EVIDENCE: CONCLUSION. Where it was shown without  
5 dispute that defendant struck deceased with a stick, thus crushing his skull and producing death, a physician called to the relief of deceased immediately after the injury could properly state that the blow was a severe one, and his statement was not an invasion of the province of the jury or prejudicial to the defendant.

**Same.** As indicated by the appearance of a wound upon the head, a  
6 physician may state the nature of the instrument with which it was inflicted; and if more than one wound he may state that the other was the probable result of a second blow, even though there was no other evidence that more than one blow was struck.

**Same:** IMMATERIAL EVIDENCE. The admission of immaterial evidence  
7 not reasonably calculated to mislead the jury or affect its verdict is not ground for reversal.

**Same:** MURDER: INSTRUCTIONS: SELF-DEFENSE. An instruction that the  
8 danger justifying a killing in self-defense need not be real, but such as to lead a reasonably prudent man to believe in its reality, and in estimating the imminence of the danger and means of avoiding it, or of the force necessary to repel it, the excitement and confusion of the surrounding circumstances must be considered, and the person threatened is not held to the same deliberate judgment as a person unaffected by danger, but should be judged only as a reasonably prudent man under the peculiar circumstances, was as favorable to defendant as the instruction requested and refused by the court in the instant case, except as to the erroneous statement to be inferred from the requested instruction that the right of self-defense exists between men engaged in mere quarreling or controversy.

**Same.** Although a paragraph of the court's instructions on the sub-  
9 ject of self-defense, if standing alone, would erroneously permit the jury to go back to the beginning of the quarrel and consider who was right on the question over which the controversy originally arose, still if construed in connection with other parts of the charge immediately associated therewith it was clear that such

was not the intent or meaning of the instruction as a whole it will not be held erroneous.

**Same: INSTRUCTIONS: DUTY TO RETREAT.** Where the court's instructions as a whole relating to the duty of a person assaulted to retreat are a correct statement of the law, and clearly embody the rule of a requested instruction, a refusal of the request is not erroneous.

**Same: INSTRUCTIONS: SELF-DEFENSE.** The right of self-defense involves the right to kill under certain circumstances; and where the defense was based upon the right to take the life of the alleged assailant, use by the court of the term "right to kill" in its instructions relative to the law of self-defense, was not prejudicial because placing the defendant in the unfavorable attitude of contending for the right to take life, rather than the mere right to defend himself by the use of adequate force.

**Same: INSTRUCTIONS: MALICE.** Malice essential to the crime of murder is such anger and ill will as indicates a wicked and corrupt intent, a condition of heart and mind having no regard for social or moral obligations; mere anger or ill will unaccompanied by any thought of doing bodily harm to him who is the object of dislike is not sufficient. The court's instructions in the instant case, when considered as a whole, are not subject to the objection that they permitted a finding of murder if defendant was merely angry when he struck the fatal blow.

**Same: INSTRUCTIONS: ASSAULT.** Where the court in its instructions sufficiently included the elements of an assault, and charged the jury that if defendant was attacked by deceased he could lawfully defend himself by force reasonably proportionate to his peril, even to the taking of life if reasonably apprehensive that his own life was in danger, a more technical definition of assault in such cases was not required, in the absence of a request therefor.

**Same: SELF-DEFENSE: EVIDENCE.** One may rightfully expel a person from his premises and forbid him to re-enter; but having expelled him he should cease the use of force and permit the intruder to depart, unless instead of departing the intruder is still seeking an opportunity to do bodily injury, and then there is no obligation to retire at the risk of a vicious assault. Under the evidence in the instant case the question of whether the defendant was in such real or apparent peril as to justify an extreme measure of self-defense was for the jury.

*Appeal from Johnson District Court.—HON. R. P. HOWELL, Judge.*

TUESDAY, MAY 7, 1912.

THE defendant was indicted for the alleged murder of Oliver P. Driver. To this charge he pleaded not guilty, and upon the trial was convicted of murder in the second degree. From the judgment entered on this verdict he appeals. The material facts are stated in the opinion.—*Affirmed.*

*Wade, Dutcher & Davis*, for appellant.

*George Cosson*, Attorney General, *John Fletcher*, Assistant Attorney General, and *C. S. Ranck*, for the state.

WEAVER, J.—Appellant lived on a farm in Johnson county, but owned a livery stable in the town of Lone Tree in the management of which he employed Oliver P. Driver, the deceased. On the 13th day of June, 1910, appellant came to Lone Tree, and while at the barn with Driver, no other person being immediately present, a quarrel or angry dispute arose between them. They were seen to emerge from the front door of the barn into the street; Driver, who was considerably the lighter man of the two, backing or (as some of the witnesses express it) “sidestepping” away toward the middle of the street, the appellant following him up in an angry or threatening manner, until, at a point variously estimated at from fifteen to twenty-five feet from the barn, appellant, suddenly stooping, caught up a stick or piece of board lying on the ground, and struck Driver an overhand blow upon the head, breaking his skull, and inflicting an injury from which death soon ensued. The movements and conduct of the parties from their exit from the barn to the striking of the blow which terminated their quarrel were observed by several witnesses, none, however, being sufficiently near to interfere or to understand



clearly the nature of the controversy between the contending parties. So far as these witnesses observed neither appellant nor Driver was armed with any weapon up to the moment when appellant caught up the board, but it is the theory of the defense, and appellant as a witness swears, that as they came out of the barn Driver drew from his pocket a knife, and opened it, threatening to disembowel appellant, who, believing that Driver in side-stepping and backing away was seeking an opportunity to rush in upon him and carry out said threat, picked up the stick, and dealt the blow in self-defense and without malice. As to the fact that Driver did have a knife in his hand, there is more or less testimony corroborating the appellant's statement. In argument in this court counsel concede the fact that Driver died from the blow inflicted by appellant, but it is contended with much force and earnestness that the killing was not felonious, and the verdict of guilty cannot be sustained upon the record.

The errors assigned are too numerous to permit their separate consideration within the reasonable limits of a written opinion, and we shall confine our discussion to those which seem to be of controlling importance.

I. One Regan was drawn to serve as a juror for the trial of the case. Upon his examination for cause, Regan stated that he knew appellant, and had met him in the jail soon after his arrest. Being asked if he

1. CRIMINAL  
LAW: jurors:  
competency:  
waiver of  
objection.

went to the jail on purpose to see appellant, he answered: "Well, not exactly. I was just looking through over there. I didn't go exactly to see him. He was there when I went. I didn't know he was in there at the time even. Mere curiosity took me there. Talked with Baker a few minutes. He did not tell me how the fight occurred. Did not talk with him about the trouble. Didn't hear anything about the case when I was there." This juror was passed by both prosecution and defense, and served upon the trial panel.



After the verdict was returned appellant assigned as one of his grounds for a new trial the fact that Regan, instead of being a casual visitor at the jail where appellant was confined, was, in fact, at that time an inmate there, with whom and in whose presence appellant had frequently talked of the affray and the facts attendant upon the killing of Driver. In explanation of the fact that he did not raise the objection when the juror was under examination, appellant says that the change in Regan's clothing and appearance was such that he did not recognize him until after the jury had been sworn and the trial was in progress.

It is argued that the concealment of the truth as to the fact of the juror's confinement in the jail at that time was a fraud upon the defendant and upon the court, which should be held to vitiate the verdict. We think this exception can not be sustained. The inquiry into the reason for the juror's presence at the jail where he saw the appellant was incidental only to the ultimate question of his impartiality and fairness of mind as between the state and the accused. Whatever may have been the true explanation of his presence there, it had no material bearing upon his competency as a juror, if as a matter of fact he was not there exposed to influences, or did not there obtain information or receive impressions, tending to bias his judgment to the prejudice of the appellant. The juror himself swears that he did not then know or hear anything about the case, and had no conversation upon the subject with appellant. True, the latter denies this statement, and says that he did talk with the juror and in his presence concerning the killing and the circumstances thereof. We doubt whether upon such a conflict of testimony, and with no other showing as to the circumstances, the trial court would have been justified in disturbing the verdict. Even upon appellant's own testimony there is no showing what particular things were said to or in the presence of the juror, and the court is in effect asked to presume that

whatever it may have been it was calculated to work to the appellant's prejudice in the mind of Regan when acting as a juror.

Moreover, it appears from appellant's statement that he discovered the identity of the juror as a fellow inmate of the jail while the trial was in progress, but no action was taken thereon until after verdict had been returned. The objection was therefore untimely, and must be held to have been waived. Had he deemed the objection a vital one, it was his privilege to announce the discovery to the court, and demand an entry of mistrial or the impanelment of another jury. He could not rightfully speculate upon the hope of a favorable verdict from the objectionable juror reserving the right in the event of disappointment to insist upon the incompetence of that juror as a ground for a new trial. *Foedisch v. Railroad Co.*, 100 Iowa, 728.

II. It is further charged that one of the jurors claimed to have knowledge that the appellant at some time in the past had killed a man in the city of Muscatine, and

2. SAME. that such juror made the statement to the rest of the panel during the consideration of the case. The only evidence offered in support of this charge tends to show that after their verdict had been agreed upon and duly signed, and while waiting for the trial judge to be called to the courtroom to receive such verdict, one juror asked another if the defendant was not the person of the same name who was said at some former time to have killed a man in Muscatine, and was answered in the affirmative, and that this statement was in the presence of some or all of the panel. Taking the testimony as a whole, we are disposed to hold that it not only fails to show prejudice to the defendant, but distinctly tends to rebut any inference of the kind. The jury had agreed, the verdict had been prepared ready for delivery, and while it was, of course, possible for any juror to still change his mind, there is no suggestion on the part of any juror that

he was in any manner or degree impressed or influenced by this bit of gossip, or that, in the absence thereof, the verdict already prepared would have been repudiated by any member of the panel. The demand for a new trial based on this incident can not be sustained.

III. It is the theory of the defense that the trouble between the appellant and Driver on the day of the homicide had its origin, in part at least, over the fact that a

3. SAME: evi-  
dence: photo-  
graphs.

lap robe belonging to the stable was missing, and that appellant charged Driver with stealing it, and insisted that he return it. Appellant says that, while still in the barn, he made the accusation above mentioned, and thereupon Driver ordered him to leave. Angry words followed, and, according to his statement, the parties assumed a more or less menacing attitude toward each other, and in stepping around they gradually approached and passed out of the door. As they were passing out, he says Driver drew and opened a knife, threatening to strike him with it, and that their proximity to each other was such that appellant could not turn or retreat without giving Driver opportunity to carry out his threat. This movement it is contended did not carry them more than twelve or fifteen feet from the barn door, and it was at this point the fatal blow was delivered. The theory of the state is that Driver was not armed with a knife or other weapon; that being much the smaller man, he was retreating or backing away from appellant, who pursued him viciously to a point twenty-five feet or more from the door, where appellant with malice, and not in self-defense, struck him down. The distance of this point from the door of the barn, whether twelve or twenty-five feet, is a matter of some importance in two respects. In the first place, the distance has some bearing on the question whether appellant was pursuing Driver with the purpose of doing him an injury, or was circling about facing Driver for the lawful purpose of repelling an

assault, and protecting himself from injury. It is further of importance from the fact that a witness for the state who was on the porch or at the window of a house standing by the side of the barn testifies that she saw the parties as they came out and saw the blow struck. If the point where this occurred was not more than fifteen feet from the door, then, according to the defense, it would have been a physical impossibility for the witness standing at the place fixed by her to see the parties to the affray or to have personal knowledge of the things to which she swears. If, however, the point in question was twenty-five feet from the door, then there would be no substantial obstruction to her view.

Soon after the homicide, a photographer, at the instance of the state, took a series of photographic views, placing his instrument at the several places occupied by the witnesses of the affray, and focusing the camera upon the spot twenty-five feet from the barn door where the prosecution claims Driver was struck down. Other views were taken placing the instrument at the last-named spot, and directing it upon the several localities occupied by the witnesses. These views were identified and admitted in evidence over the objection of the defense. Error is assigned upon this ruling. It is complained that the photographer was permitted to speak of the spot twenty-five feet from the door as "the place where Driver fell," when it was conceded by all parties that he had no knowledge of the fact, except as he had been told by others. It is true that the witness made use of the expression criticised, but, giving a fair statement of his testimony, it is perfectly clear that he meant no more, nor could any juror of average intelligence have understood him as meaning any more, than that this was the spot pointed out to him as the place where Driver fell, and that the photographs were taken to illustrate that particular spot and its surroundings. Such evidence is being made use of practically every day in the trial courts. The photographer takes his view from the

place indicated to him by his employer. He vouches for no more than the fidelity of the pictures taken from such standpoint, nor could the jury in this case have given it any greater effect. There is nothing to indicate that these views were not a fair representation of the place where, according to the state's theory, the deceased fell, and as such they were admissible in evidence. Of course, they were not conclusive of the true location, and, if appellant believed that views taken from or directed to the point where he locates the culmination of the affray would show a material variance from those presented by the state, it was an easy expedient to procure them and place them in evidence by the side of those relied upon by the prosecution. It is unfortunately true that photographic representation is sometimes misleading, but, on the other hand, it is frequently a valuable aid to the proper understanding and application of testimony of witnesses. We are unable in the record before us to find any reason for saying that there was error in exhibiting the photographs to the jury. The argument of counsel carried to its logical conclusion would exclude from the category of competent evidence all photographs, plans, plats, and diagrams which are not made by persons able to speak of their own knowledge concerning the facts which such representations are intended to illustrate. We are not willing to commit the court to such a radical innovation upon the long accepted rules of law governing the admissibility of testimony. *State v. Matheson*, 130 Iowa, 440; *State v. Rogers*, 129 Iowa, 229.

IV. The state put upon the stand one Tobias and one Funck to impeach the general reputation of the appellant for truth and veracity. It developed in the course of their testimony that both witnesses were residents of Muscatine, Iowa, some twenty miles distant from the place where appellant lived. This evidence it is said, should have been excluded because it appeared that the witnesses did

4. SAME: evidence of reputation: competency of witness.

not live in the appellant's neighborhood. This objection might well have been sustained by the court without error, but its admission was not necessarily erroneous. Both witnesses testified to their knowledge of the general reputation of appellant in his neighborhood, and not in their own. Their particular means or facilities of obtaining such knowledge were not developed by the direct or cross examination. If they were, in fact, acquainted with appellant's reputation in this respect in his own neighborhood, we think there is no sound reason for holding them incompetent to testify of it. The fact of their residence at a distance would go to the weight and value of their testimony, and not to its admissibility.

V. In answer to a question directed to him, a physician testifying for the state was permitted to say that the blow which produced the wound upon the head of the deceased was a "severe" one. This, counsel insist, was an invasion of the province of the jury. The objection is untenable. The witness was not asked nor did he undertake to state how the injury was inflicted nor what in fact caused it; hence the authorities cited in support of this assignment of error—*State v. Rainsbarger*, 74 Iowa, 204; and *Sachra v. Manilla*, 120 Iowa, 567—are not in point. The witness had shown that he had been called to the relief of the deceased immediately after the injury, and that an examination disclosed a very serious fracture of the skull, which was verified by the post mortem investigation. That the doctor should say that a blow producing such result must have been a "severe" one was to state a fact which would be apparent to every juror of intelligence, and his statement added nothing to the description which he had already detailed. Whether, as counsel argue, such result might have been produced by a comparatively light stroke with a heavy instrument or a powerful blow with a light instrument, is a wholly immaterial consideration. Whatever be the truth

5. SAME: expert  
evidence:  
conclusion.

in that respect, there is no room here for academic argument or speculation upon the varying circumstances under which such an injury might have been received. It is shown without dispute that appellant did strike the deceased upon the head with a stick of some kind producing the injury from which death ensued, and that the stroke was administered with sufficient force to shatter the victim's skull. Whatever the weight or character of the weapon and whatever the degree of muscular energy employed, the blow could not have been anything less than "severe," and, while it did not require an expert to discover that fact, his statement was clearly without prejudice.

The doctor was further asked: "What would you say as to the character of the weapon or club that was used to produce this fracture you found in the skull?" And

6. SAME. over the objection of the appellant he answered: "I believe a blunt or rounded, fairly heavy object—possibly like a whiffletree. That is the most common shape." If the witness were to be interpreted as saying that the blow was administered with a whiffletree, the answer would probably have been incompetent; but such is not his statement. He speaks of a whiffletree merely as an illustrative example of the weapons with which such an injury could have been produced. Testimony of physicians and surgeons as to the nature of the weapon indicated by the appearance of a wound upon the human body is an everyday incident in the trial of persons charged with crimes of violence, and the rule under which it is admitted does not appear to have been violated in this instance. *State v. Rutledge*, 135 Iowa, 581; *State v. Morphy*, 33 Iowa, 270; *State v. Seymour*, 94 Iowa, 699.

It also appears from the physician's testimony that a wound was found on Driver's ear, and, upon being asked whether this injury could have been caused by the same blow which fractured the skull or by another distinct stroke, he replied that the wound was more probably the result

of a second blow. This is said to be incompetent and prejudicial, because no witness claims that more than one blow was struck and this testimony gave counsel for the state a pretext for arguing to the jury that appellant must have struck deceased while they were still in the barn.

Testimony is not necessarily incompetent because counsel deduce unwarranted conclusions therefrom. But aside from this obvious generalization, if two wounds were found upon the head of the deceased, we see no reason why the fact should not be shown in evidence, even though no witness saw more than a single blow delivered, or why the possible inference that a blow had been struck before the parties emerged from the barn was not a legitimate matter of argument. True, the wound on the ear may have been received in the fall of the deceased when knocked down by the appellant or from some cause for which he was in no manner responsible, but its discovery and treatment by the surgeon immediately after the affray was over makes it fairly a part of the *res gestae* to be given to the jury for what it was worth.

VI. One Windes, father-in-law of the deceased, testified that he saw the parties after they came out of the barn, and saw appellant pick up the stick and strike down

the deceased, and, as the witness approached, Baker threatened him also if he interfered.

7. SAME: immaterial evidence.

In answer to an inquiry as to what he did next, the witness stated that he went for an officer. Counsel for appellant objected to the question, and moved to strike out the answer as incompetent and immaterial, but the evidence was permitted to stand. Error is assigned upon this ruling. While the materiality of this evidence is not very apparent, it is impossible to draw any reasonable inference of prejudice therefrom. Few, if any, cases are tried to a jury in which the testimony is wholly purged of all trivial, immaterial, and irrelevant matters, but, while courts, lawyers, and witnesses remain human, this is in-



evitable, and, if no case is to stand except upon an absolutely perfect record, no judgment will ever be approved on appeal.

The proper inquiry is not merely whether a given circumstance is immaterial, but whether, if immaterial, it is reasonably calculated to mislead the jury or affect its verdict. We feel no such result could follow the giving of this evidence.

Other errors are assigned upon the admission of evidence to impeach the testimony of certain witnesses examined on the part of the defense, and of the conduct and manner of the state's counsel in the examination or cross-examination of witnesses. We can not undertake to consider these in detail. We have examined the record in each instance with care, and find no error calling for the interference of this court.

VII. Exceptions were preserved to the several paragraphs of the court's charge to the jury and to its refusal to give others requested. For example the defendant re-

8. SAME: murder:  
instructions:  
self-defense. requested an instruction as follows: "In considering the instructions given relating to the question of force which a man may use in self-defense, you are instructed that if men are engaged in a quarrel or controversy, the law does not require exactness or nicety in determining the amount of force which they may use in self-defense. You are to consider this under the instructions in view of the excitement or anger, if any, and under the circumstances surrounding the parties at the time." This the court refused, but on its own motion gave the following: "You are instructed that the danger which will justify a killing in self-defense need not be real, but only such as would lead a reasonably prudent man to believe in its reality; and in estimating the nature and imminence of the danger and the choice of means to avoid it, or the amount of force to be used in repelling it, the excitement and confusion of the surrounding circum-

stances, must be considered, and the party assailed is not held to the same cool and deliberate judgment in estimating the danger or the choice of means of repelling it as is possible to persons unaffected by excitement or danger in subsequently contemplating the situation. You are only to judge him as a reasonably prudent, cautious, and courageous man under the circumstances disclosed." This charge appears to be fully as favorable to appellant as the one refused, except in the mistaken inference to be drawn from the request that a right of self-defense exists as between men engaged in mere "quarrel or controversy."

In this connection, also, the court in stating the law as to the duty of a person to retreat from an assault if he may reasonably do so with safety rather than to take life

in self-defense said that "the right of self-

9. SAME.

defense does not exist when the defendant is in the wrong in bringing on the difficulty, unless he retreats before serious injury is done and the other party then becomes the aggressor." Error is also assigned upon this instruction. Were this language to be considered alone, it could not be approved, as the jury could well infer therefrom that they were at liberty to go back to the beginning of the quarrel and consider the right and wrong of appellant's charge that Driver had stolen his lap robe, and this we think could not properly be done. But when we read all the court's instructions in this respect, it is clear that such was not the intent or meaning of the statement. Immediately before this paragraph, the court in speaking of the law of self-defense had described it as the right of one who is unlawfully attacked or assaulted by another to resist and repel such assault by force. Immediately following such paragraph, he proceeded to instruct the jury as to what facts could properly be considered in determining "who commenced the assault." Reading all that was said on this subject, it is entirely clear that the court used the sentence, "when the defendant is in the wrong in bringing

on the difficulty," as the equivalent of "when the defendant is the aggressor," or "when the defendant first begins the fight." The jury could give it no other force or effect without disregarding the plain purport of the instructions given them, and this we must assume they did not do.

VIII. The court refused the defendant's request to instruct that: "If Driver had a knife in his hand and was threatening to cut Baker at and about the time he was

10. SAME:  
instructions:  
duty to  
retreat.

struck by Baker, then Baker was not as a matter of law bound to retreat. All the law requires is that, under the circumstances as

they appear to him as a reasonable man, he would act as a reasonable man under such circumstances." This request counsel contrasts with the following excerpt from the court's charge, which is said to be erroneous: "To justify the taking of life, the person assailed must be in danger of losing his life, or of suffering some great bodily injury at the hands of his assailant, and it is, furthermore, the duty of a person in such danger of death or great bodily injury to retreat and withdraw from the encounter if an avenue of escape is open, and he can withdraw with safety to himself." The method of this criticism is not quite fair to the trial court. It is true that the language quoted is found in the charge, but it constitutes but one isolated expression which does not of itself reflect the substance of the instructions. This will be seen by reference to the quotation already made from the charge. Moreover, the jury were still further told: "You are instructed that if you find that the deceased assaulted the defendant with a knife, and the assault was so fierce and the danger so immediate and threatening as not to allow him to retire from the assault or delay in defending himself therefrom without apparent danger, and he reasonably believed himself in imminent danger of death or great bodily harm, he may kill his assailant, and the killing would be justifiable, and he could not be punished for the same." Cer-

tainly this gave to the appellant the sum and substance of the rule for which counsel contend, and the refusal to repeat it in the form requested was not erroneous.

A chief burden of the criticism of the charge in relation to the law of self-defense is that the court in several instances speaks of the "right to kill" in self-defense, and

11. SAME:  
instructions:  
self-defense.

this it is said puts appellant in the unfavorable attitude of contending for the right to take life, when, in fact, he demands no more than the right to defend himself by the use of adequate force. It would seem to be a sufficient answer to this complaint to say that the alleged self-defense in the case under consideration did go to the extent of killing the alleged assailant, and the defense is of necessity based upon a right to kill under the circumstances by which appellant was surrounded, and the court could hardly speak of the defense in other terms. The right of self-defense includes the right to kill under certain circumstances, and it is upon that right the appellants plants his defense. It is a harsh phrase, but it has reference to harsh conditions and harsh acts, and no error can be well assigned upon the use of appropriate words by the court in speaking of them.

IX. Another assignment of error is stated as follows: The court erred in saying in the fifth instruction, "Whoever kills any human being with malice aforethought, either

12. SAME:  
instructions:  
malice.

express or implied, is guilty of murder," and then defining malice as meaning, among other things, "anger," "hatred," and "revenge;" also in defining it to mean ill will. The definition of "murder" is given in the language of the statute (Code, section 4727), and surely no error can be predicated thereon. But the real point of the exception taken is aimed at the court's statement of the meaning of "malice," as used in said definition. From that statement counsel take the following excerpt: "By 'malice' is meant not only anger, hatred and revenge, but any other unlawful and unjustifiable motive."

And from this say that the jury were directed or left at liberty to find that, if appellant was angry when he struck the fatal blow, he is guilty of murder. Here, again, counsel extract a single sentence from a general statement, and give to it a meaning and effect which it does not convey when read in its proper setting. What the court did say is as follows:

Whoever kills any human being with malice aforethought, either express or implied, is guilty of murder. Malice aforethought is a necessary ingredient in the crime of murder, either of the first or second degree, and must be established by the state before you would be justified in finding the defendant guilty of murder in either degree. By 'malice' is meant not only anger, hatred and revenge, but any other unlawful and unjustifiable motives. It is not confined to ill will against the individual, but is intended to denote an action flowing from any wicked and corrupt intent. An act done with a wicked mind and attended with such circumstances as to plainly indicate a heart regardless of moral and social duties, and fully bent on mischief, indicates malice within the meaning of the law. The word 'aforethought' used in connection with the word 'malice' in our law simply means thought out or conceived beforehand, but it is not necessary that such malice should have existed for any considerable length of time to constitute malice aforethought within the meaning of the law. It is sufficient if it exists for any length of time before the commission of the act. 'Malice aforethought' may be either express or implied. 'Express malice' means a settled purpose and design to commit the offense in question, and must be shown by proof of that fact directly and without inference. It may be proved as generally understood by expressions of hatred, threats, and the like. 'Implied malice' means that which may be inferred from the act and fact shown. Thus, when a wanton, wicked, cruel, or revengeful act is shown, the inference or implication may be drawn that the person who did such act was actuated by malice.

Not only is the jury not given direction or license to

charge defendant with malice because of mere anger or ill will which may or may not have any mixture of murderous purpose, but they are told that an act done in malice is for the purposes of the law one which is prompted by a "wicked and corrupt intent," an act done with a "wicked mind" under circumstances "plainly indicating a heart regardless of moral and social duties and fully bent on mischief." It is to be admitted that one may be angry or indignant, and yet have no malice in his heart, or he may even entertain a feeling of ill will without thought of doing bodily harm to him who is the object of his dislike, yet anger or ill will or both often do inspire and characterize malice which leads to murderous violence. It is such anger and ill will indicating wicked and corrupt intent, a condition of heart and mind having no regard for social or moral obligations, to which the court directs the attention of the jury, and in so doing there was no error.

X. The court did not specifically define to the jury the meaning of the word "assault," and of this appellant complains. The omission was in no way prejudicial to the defendant. The court did in terms which

13. SAME:  
instructions:  
assault.

sufficiently include the elements of an assault charge the jury that, if attacked by the deceased, defendant could lawfully defend himself by force reasonably proportioned to the danger in which he was placed, and, if deceased in making such an attack was armed with a knife putting the defendant in reasonable apprehension of death, resistance thereto might lawfully be carried to the point of taking life. Had appellant desired a more formal and technical definition of the term, the court would without doubt have given it upon request, but the essential elements of assault and the consideration to be given thereto were sufficiently embodied in the charge as given. The technical definition of the word and its meaning as employed in popular speech are not so different as to require the court to resort to specific definition where

it may be used. *State v. Penney*, 113 Iowa, 697; *State v. Clark*, 78 Iowa, 492; *Henderson v. People*, 124 Ill. 607 (17 N. E. 68, 7 Am. St. Rep. 391); *State v. Harkins*, 100 Mo. 666 (13 S. W. 830). The court did, as we have seen, properly define the crime with which appellant was charged, and this was as far as it was necessary to go in the way of definition in the absence of any request for more.

Finally it is argued with much earnestness that the verdict is not sustained by the evidence. We shall not prolong this opinion for a general review of the facts. It

is enough to say that in our judgment the  
14. SAME:  
self-defense:  
evidence. testimony clearly warranted a conviction.

That appellant did kill Driver was shown without substantial dispute. There was also ample evidence which, if believed by the jury, justified the finding that the fatal blow was not struck in self-defense. Of what took place in the barn there is no living witness except the accused himself. The credit and the weight to be given his testimony was for the jury alone. Whether Driver was armed with a knife, and whether he threatened or attempted to strike the appellant with such weapon, was not so clearly proved that the court can say as a matter of law that the fact was established. In any event, whether Driver was or was not armed when he backed out of the barn in the direction of the street, it was open to the jury to find that, as a reasonable man, appellant ought to have stopped at the door and permitted his antagonist to go his way, instead of following him or continuing with him out into the public way and there striking him down.

If the barn was in some sense the appellant's "castle" from which he might lawfully expel the deceased, and deny him re-entrance, the expulsion once being accomplished, it was his duty to cease the display of force and permit the intruder to depart.

Of course, if Driver was in fact armed, and instead of retiring from the conflict was simply moving about seek-

ing an opening to rush in and wound or kill the appellant, the latter was not obliged to retire or turn away at the risk of a vicious assault, but the court can not say such was, in fact, the true situation. That question was fairly submitted to the jury which found that appellant was not in such real or apparent peril as to justify the extreme measure of self-defense to which he resorted.

Some members of the court would have been better satisfied with a conviction of manslaughter, but all are united in the conclusion that the finding against the theory of justifiable homicide is well sustained by the record.

Other questions have been presented by counsel. Most of them are governed by the conclusions hereinbefore announced and others are not sustained by the record.

The judgment of the district court will therefore be—  
*Affirmed.*

### SUPPLEMENTAL OPINION.

SATURDAY, DECEMBER 14, 1912.

PER CURIAM.—On the consideration of appellant's petition for rehearing, the court is of the opinion that the sentence be reduced to fifteen years, and it is so ordered. Otherwise the petition for rehearing is overruled.—*Overruled.*

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KATE NOTHEM, Executrix of the Estate of HUBERT NOTHEM, deceased, Appellant, v. STEPHEN LONDERGAN and IRA C. EDMONDS, Executors of the Estate of E. J. EDMONDS, deceased, and S. LONDERGAN, Appellees.

**Evidence:** COMMUNICATIONS WITH A DECEDENT: WAIVER. A witness interested in the result of the suit is not competent to testify to transactions or communications with a deceased party; but if the other party calls him as a witness he waives the objection to his competency as to those matters inquired about.



**Payment: MISTAKE: RECOVERY: EVIDENCE.** In this action to recover 2 money claimed to have been paid by mistake and oversight, the evidence is held to require a finding that plaintiff's testator gave a check to defendants in settlement of a partnership account, which by mistake and oversight was not taken into account in the final settlement, and that plaintiff was entitled to recover the difference between what testator was owing the partnership and the amount of the check.

*Appeal from Cherokee District Court.*—HON. F. R. GAY-  
NOR, Judge.

WEDNESDAY, OCTOBER 16, 1912.

ACTION to recover a sum of money paid by one Nothem during his lifetime to E. J. Edmonds, now deceased, and to defendant Londergan. It is claimed that said payment was made through mistake, or that the payment was not taken into account in a settlement of partnership affairs of H. Nothem & Co., of which firm all parties were members. Defendants denied that there was any mistake or overpayment, and claimed that they received less than they were entitled to on the partnership settlement. On these issues the case was tried to the court resulting in a decree dismissing plaintiff's petition. The executrix of Nothem's estate appeals.—*Reversed and remanded.*

*Kass Bros. and T. M. Zink, for appellant.*

*Herrick & Herrick and Molyneux & Maher, for appellees.*

DEEMER, J.—The firm of H. Nothem & Co., composed of Nothem, E. J. Edmonds and S. Londergan, was engaged in the lumber, coal, grain, and live stock business at the towns of Remsen and Oyens, in this state. It was dissolved in September of the year 1904, Nothem becoming the sole owner of the business, he purchasing the interest

of each of his copartners. Prior to the making of the contract of purchase and of dissolution, an invoice under date of August 1 was made of the stock and business of the partnership, and this invoice was made a part of the contract. This contract, so far as material, reads as follows:

This agreement, made and entered into, in duplicate this 28th day of September, 1904, by and between E. J. Edmonds and S. Londergan of Marcus, Iowa, parties of the first part, and H. Nothem of Remsen, Iowa, party of the second part, witnesseth: That for and in consideration of the stipulations herein contained the partnership heretofore existing among the parties of this agreement under the firm name of H. Nothem & Company, doing business at Remsen and Oyens, Iowa, is by mutual consent dissolved; and in consideration of the payment to be made as hereinafter set forth, and in consideration of the dissolution of said partnership, the parties of the first part hereby sell and agree to convey and transfer to second party by proper instruments of conveyance, the following described property, to wit: [Here follows a description of property.] Excepting, however, the stocks of merchandise and evidences of indebtedness due the firm, for the total sum of two-thirds of seven thousand five hundred eighty-seven (7,587) dollars. (2) And the said first parties also sell and agree to transfer to second party, the undivided two-thirds of the entire stocks of merchandise, consisting of lumber, lime, stone, building material of all kinds, hardware, coal, grain, live stock, and other merchandise belonging to said firm of H. Nothem & Company, situated in the towns of Remsen and Oyens, Iowa, according as set forth, and for and at the prices specified in the certain inventory and invoice taken of said stocks commencing and dated August 1, 1904, subscribed by the parties, attached hereto and made a part of this agreement, in duplicate; provided, that the extensions of the amounts and footing of the items set forth in said inventory and invoice, if incorrect, are subject to correction. And the second party agrees to pay the first parties at Remsen, Iowa, two-thirds of the total amount of said inventory and invoice above specified. The said purchase price of the property hereby sold shall be paid by second party as follows: The

sum of three thousand (\$3,000.00) dollars on the execution and delivery of this agreement, and the remainder on or before the first day of October, 1904, less however, two-thirds of the indebtedness of the firm of H. Nothem & Company existing on August 1, 1904, the date of the inventory and invoice above mentioned, and which have been paid since that date. All accounts, books of account, and evidences of indebtedness due the firm of H. Nothem & Company existing on August 1, 1904, the date of said inventory, and not since collected, shall be scheduled in triplicate, one copy of which shall be delivered to parties of the first part, one copy to second party, and one copy together with said accounts, books of account and evidences of indebtedness due said firm shall be delivered to the German Savings Bank of Remsen, Iowa, for collection; said bank shall receipt for the same upon the copies retained by the parties hereto; said accounts and books of account shall at all reasonable times be open to the inspection of each of the parties and the same shall remain in the town of Remsen, Iowa, until paid; said bank shall collect said accounts and indebtedness due said firm and the proceeds when collected, shall be held by said bank as a separate fund and disbursed in the manner following, to wit: First. The payment of all indebtedness existing against said firm of H. Nothem & Company on August 1, 1904, the date of said invoice, now remaining unpaid. Second. The balance on hand on the first day of each and every month shall be paid out by said bank as follows: One-third to E. J. Edmonds, one-third to S. Londergan, and one-third to H. Nothem, being the parties of this agreement. . . . A statement shall be made of all sums collected on account of the said firm of H. Nothem & Company since August 1, 1904, the date of said inventory, existing on the books of said firm on said date, and all sums considered as assets of said firm of H. Nothem & Company and shall be disbursed accordingly. The amounts found due under this contract shall be deemed due and payable October 1, 1904, at which time and upon the payment of the purchase price hereinbefore agreed upon, the said first parties shall execute and deliver to second party any and all necessary instruments of conveyance and transfer, free from incumbrance since date of their title, of

the property hereby sold, which said conveyance and transfers shall include the business, good will, and all leasehold interest of said firm of H. Nothem & Company. This agreement so far as it pertains to the dissolution of the firm of H. Nothem & Company and the distribution of the firm assets shall relate back to the first day of August, 1904, the date of said inventory and invoice, and all business transacted since that date in the name of the said firm, excepting as otherwise herein set forth, shall be regarded as the business of the second party and not of the partnership.

Some time in August of the year 1904, and after the invoice had been taken, it was discovered that Nothem had overdrawn his account with the partnership to the amount of \$1,191.59, and at the request of and upon the instance of his partners, he on the 13th day of August, 1904, in the name of the firm, "By M. J. Nothem," executed a check upon the German Savings Bank for double the amount of his indebtedness to the firm, to wit, for \$2,383.18, to Edmonds-Londergan Company, and this seems to have been indorsed by the payee and marked paid on August 20th by the bank upon which it was drawn. No mention was made of this check in the contract, nor was it included in the invoice of August 1st, or mentioned in the bills payable. At the time of the execution of the contract Nothem paid the other members of the firm the sum of \$3,000, and on October 1, 1904, the day fixed for final settlement, he paid them the sum of \$20,322.52, being the balance of the purchase price, no account being taken of the check for \$2,383.18, executed after the invoice was taken. It is claimed that this was through mistake and oversight, and that defendants' attention was called to the matter, without result, on the day of settlement. According to the invoice the assets of the company on August 1st amounted to \$39,872.07, and the liabilities were scheduled at \$3,923.62, which, of course, did not include the check of \$2,383.18. It was agreed, as will be noticed, that all books of account

and evidences of indebtedness due the firm should be turned over to the German Savings Bank for collection, and that from the proceeds thereof the bank should pay the unpaid indebtedness of the firm existing on August 1st, and that of the remainder one-third should be paid to each of the former partners on the first day of each and every month thereafter. The purchase price of the stock of merchandise was fixed by the invoice of August 1st, but it was also agreed that all business transacted by the firm after that date should be regarded as the business of Nothem individually. Plaintiff claims that the check issued to the Edmonds-Londergan Company was omitted from the final settlement by mistake and oversight, that it should have been included, and that all he was owing his copartners by reason of his overdraft was two-thirds of the amount thereof, to wit, \$794.40 instead of \$2,383.18, and the action is to recover the difference, to wit, \$1,588.78. On the other side, it is contended that this transaction was entirely separate and independent; that the check for \$2,383.18 was made to balance the accounts of the individual partners, and that it was not considered in the settlement and should not have been, and that there was no mistake or oversight either at the time of settlement or at any other time. This presents the fact issue in the case, and the appeal involves, as we understand it, nothing but this question of fact.

Since the commencement of the action both Nothem and Edmonds have died, and their representatives have been substituted, and one of the incidental questions in the

1. EVIDENCE:  
communications with a  
decedent:  
waiver.

case is the right of Londergan to testify against the executrix of Nothem's estate. By calling him as a witness plaintiff waived any objection to his competency as to the matters inquired about by him. *Walkley v. Clarke*, 107 Iowa, 451; *Mollison v. Rittgers*, 140 Iowa, 365. As the witness is a party, he was not competent to testify to any other

transactions or communications with the deceased, Nothem. *Stolenburg v. Diercks*, 117 Iowa, 25; *Culbertson v. Salinger*, 131 Iowa, 307; *Clinton Bank v. Underhill*, 115 Iowa, 292. Defendant Londergan was not a mere agent for his co-partner, Edmonds. If the two received the check and cashed it, each is responsible for the whole amount, so that he was vitally interested in the suit and disqualified under Code, section 4604, save as to matters to which he testified on direct examination, when called by plaintiff.

Londergan testified as a witness for plaintiff that the check in dispute was part payment on the contract of settlement—that is, part payment of the purchase price of the business—but, when called as a witness on his own behalf, he said that at the time the parties first talked about the dissolution, the check was given to equalize the accounts of the partners, “to square them up,” and that it had nothing to do with the actual contract of sale; that it was not considered or talked about at all, for the reason he says that it equalized prior accounts and fully settled the same. But he also said that the check was given to pay the amount that Mr. Nothem owed the company, and to square up the account. It is evident that it was not listed in the invoice as a liability of the firm, and it is also admitted that it was not taken into account at the time of final settlements. That the check was paid out of the private funds of Nothem—that is, from the proceeds of the business after August 1st—is also well established. It also appears that, when the check was given, Nothem’s individual account with the firm amounting to \$1,191.59 was balanced by a credit to that amount. It must therefore, have been listed among the accounts owing the firm in the inventory taken August 1st, which was the basis for the contract between the parties. At that time Nothem did not owe the firm the amount of the check, nor did he owe that amount to the individual partners.

2. PAYMENT:  
mistake:  
recovery:  
evidence.

If the account had stood as it was at the time of the invoice and had been paid by Nothem, it would not have increased the assets shown by the invoice, and the account so outstanding on August 1st was evidently considered in fixing the purchase price. The check to Edmonds-Londergan Company was not treated as a liability, and all that the copartners could justly claim on Nothem's account was two-thirds of the amount thereof or \$794.40. Of course, the parties might agree that each partner should draw out an equal amount from the firm, and thus equalize matters if they saw fit. And, had they done so, and omitted any reference thereto in fixing the purchase price because each was entitled to draw the same amount from the firm, plaintiff would have no just cause of complaint. But the testimony offered to establish this claim is from an incompetent witness. On the whole, we are constrained to hold that there was a mistake in giving this check and an omission to include it or take it into account on final settlement because of oversight. Such being the case, plaintiff is entitled to have the case decided on the real merits and upon the contract entered into by the parties. All that Nothem owed to his copartners at the time the check was given was \$794.40, and for the difference between that amount and the check given to them, to wit, \$1,588.78, he should have had judgment.

The decree will therefore be reversed, and the cause remanded for judgment for the amount last stated, with interest thereon from October 1, 1904.—*Reversed and remanded.*

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HANNAH BARR, Appellee, v. D. W. BARR, Appellant.

**Divorce: CRUEL AND INHUMAN TREATMENT: ALIMONY: EVIDENCE.**

In this action by the wife for divorce and alimony on the ground of cruel and inhuman treatment, the evidence is reviewed and held to support a decree for plaintiff, and an allowance of \$5,000 permanent alimony.

*Appeal from Delaware District Court.*—HON. F. C. PLATT, Judge.

TUESDAY, NOVEMBER 12, 1912.

ACTION for divorce. Decree as prayed, and defendant appeals.—*Affirmed.*

*Welch & Welch*, for appellant.

*W. H. Norris, Carr, Bronson & Carr* and *E. B. Stiles*, for appellee.

WEAVER, J.—The parties were married in March, 1905. Defendant was then about forty-seven years old, owned a large farm, had been twice widowed, and was the father of one child, a daughter. The plaintiff was about ten years his junior, was possessed of money or property to the amount of about \$1,200, and had no previous matrimonial experience. Not long after the marriage, the relations of the parties became more or less inharmonious. In the year 1909 their differences became so serious that plaintiff left home for a time. Defendant sought a reconciliation, confessed his fault in the matter, signed a written retraction of charges he had made against his wife, and she returned to him. The treaty of peace proved to be of little effect, and in March, 1910, this action was instituted for divorce upon the ground of cruel and inhuman treatment, endangering the life of the plaintiff. The defendant's answer consists of a simple denial of the charges of cruel treatment, and an allegation, stated generally and without specification of particulars, that the domestic troubles and difficulties of the parties "were provoked and caused by conduct of the plaintiff, which conduct on her part was without justification or right, and was not provoked by the defendant." After hearing



the testimony upon the issues thus joined, the court found for the plaintiff and awarded her a divorce, with alimony in the sum of \$5,000 and attorney's fees. We are asked to reverse this decree on the ground that the evidence fails to establish any just cause for divorce. It is further insisted that, in the event that a reversal is not ordered, the allowance of alimony ought to be materially reduced.

Counsel for the appellant favors the court with no argument whatever, except the bald statement that the plaintiff's case is "devoid of evidence to sustain" her charges of cruel treatment; that said charges, or most of them, have been specifically denied by the defendant as a witness in his own behalf; and that, the burden being upon the plaintiff, she must be held to have failed to show ground for relief. We find ourselves unable to so easily dispose of the questions at issue. Plaintiff's testimony tends to show that defendant's treatment of her from an early day of their married life was not only abusive, but grossly inhuman; that he was a man of violent passion, subjecting her to unprintable personal indignities, striking and kicking her on numerous occasions, applying to her insulting and opprobrious epithets, charging her with unchastity, slandering her family, friends, and associates, depriving her of her accustomed social and religious privileges, and in many other ways making her life an unbearable burden. It is true that many of the particular incidents related by her are denied by him, but she is sufficiently corroborated, both by the testimony of other witnesses and by the admissions or concessions of the defendant, as to many of the material facts, to amply justify and sustain the finding of the trial court upon the merits of the case. For example, it is very clear that the defendant was of an unreasonably, if not insanelly, jealous disposition; that he frequently, if not continuously, and in the vilest terms, charged her with unchastity. Not content with making these charges to the wife herself in the

confidence and privacy of their home, he made them in the presence of others, and deliberately and repeatedly committed them to writing. He addressed a letter to his own young daughter, in which he charged his wife with adulterous and lascivious conduct, couching the accusation in terms which even a grossly depraved man would hesitate to use in addressing a common prostitute. He tortured the plaintiff by repeated written threats of suicide, coupled with accusations, open or veiled, of marital infidelity. Some of these writings were addressed to others, and some to the public. He removed the receiver from the telephone to prevent her holding conversations with neighbors. Without her consent he obtained possession of his wife's keys, opened her private desk or safety deposit box, and took possession of a note for \$600, which he had given her for money she had lent him soon after they were married. When his wife's sister, who was visiting the family, occupied a bed with the plaintiff, defendant forced himself into the bed with them, and according to the two women he sought then and there to have intercourse with the sister, which she resisted, and finally, with the plaintiff, was driven from the room. The essential features of this testimony he admits, and says they had a "rotten time." He approached the hired girl with indecent proposals. On several occasions plaintiff was driven to leave her bed and room and pass the night with the domestic or with her daughter. It appears, not only from the wife's testimony, but from the admissions of the defendant and from the nature of his complaints in writing and otherwise, that he was inclined to brutal sexual excess. It is more than likely that this conduct produced in the plaintiff, who appears to be a woman of some education and refinement, a feeling of intense repugnance, which she could not always repress. She would have been more than human and less than a woman of normally decent instincts had it been otherwise. He appears to have been incapable

of explaining to his own mind a refusal or avoidance of his demands in that direction, except upon the theory that his wife was reserving her favors and embraces for others than himself, and he charged her with adultery with his own brother and the family physician and others. Of the truth of these charges there is not the slightest support in the record, except as it is insinuated in the testimony of a single witness. The general moral character of that witness was thoroughly impeached, and his story upon the face of it bears the stamp of improbability. There is much more testimony tending to support the plaintiff's allegation of cruel treatment at the hands of her husband; but we shall not burden this opinion with its further recitation. It is enough to say that as a whole the record reveals physical maltreatment and abuse of the plaintiff at the hands of her husband, coupled with deliberate injury to her self-respect and peace of mind, such as no woman of average strength and sensitiveness could bear for any great length of time without endangering her life or reason. The decree adjudging her entitled to a divorce has our full approval.

Concerning the alimony allowed, if we were to take for granted the correctness of appellant's statement that the net value of his property is only about \$15,000, we might be induced to think that the allowance of \$5,000 was excessive. But in our judgment he clearly underestimates the value of his estate, and then reduces his net worth by a more or less doubtful claim of large indebtedness, the greater part of which he says is held by his immediate relatives. He has a farm of some five hundred acres, which is well stocked with horses, cattle, sheep, and hogs, and we are satisfied that if his property is to be estimated at its full market value, and the "water" extracted from his alleged liabilities, it would be found to exceed his estimate very largely. We are not disposed to interfere with the judgment for alimony. The attor-

ney's fees allowed by the trial court are not so large that we are inclined to interfere with them. Except such as have already been allowed, no other or additional attorney's fees will be assessed upon this appeal. Plaintiff having already received an allowance under order of this court for expenses in preparing her case for this court, the cost of her printing will not be taxed.

For the reasons stated, the decree below will be affirmed, and the costs, except costs of plaintiff's printing, will be taxed to the defendant.—*Affirmed.*

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STATE OF IOWA v. J. H. ZECHMAN, Appellant, and STATE  
OF IOWA v. J. E. ZECHMAN, Appellant.

**Physicians: LICENSE: RECORDING.** A physician who has procured a  
1 license to practice and has had it recorded in the county of his residence, is entitled to practice in any county of the State without any further record of the certificate, unless he changes his residence, or is an itinerant physician.

**Same: INDICTMENT: SURPLUSAGE.** Where an indictment charged a  
2 physician with practicing medicine without having procured a license, the additional charge of failing to have the same recorded was mere surplusage; and instructions on the subject of recording the license were not prejudicial.

**Same: PRACTICE OF MEDICINE: LICENSE: INSTRUCTIONS.** Where it ap-  
3 peared on a prosecution for practicing medicine without a license that defendants professed to be members of a certain school, maintained an office and held themselves out to treat patients for disease, and did so without having a license from the board of medical examiners, they were guilty of violating the statute requiring a license, in so far as they devoted themselves to and employed means for healing the sick; and they were not prejudiced by instructions to the effect that they might be convicted if without license they publicly professed to cure and heal, or devoted themselves to and employed means to cure, heal and alleviate pain, although the statute does not specifically refer to such acts.

**Same: APPLICATION OF STATUTE.** The statute requiring a license to  
4 practice medicine applies equally to physicians who hold themselves

out as such and publically profess to cure and heal, as to those who make a practice of prescribing for the sick.

*Appeal from Polk District Court.*—HON. HUGH BRENNAN, Judge.

TUESDAY, NOVEMBER 12, 1912.

THE defendants were separately indicted, tried, and convicted for the crime of illegal practice of medicine, and each has appealed from such conviction.—*Affirmed.*

*Morris & Hartwell, and F. G. Ryan, for appellants.*

*George Cosson, Attorney General, and John Fletcher, Assistant Attorney General, for the State.*

McCLAIN, C. J.—As the appeals in these two cases involve the same questions, they may well be considered and decided together.

I. The charge in the indictment in each case was that the defendant in Polk county “did wilfully and unlawfully practice medicine and then and there publicly professed to be a surgeon, physician and obstetrician and assume the duties of such and make a practice of prescribing and furnishing medicine for the sick and publicly professed to cure and heal;” and, further, that the defendant “then and there did not have a certificate from the proper authorities so to practice and did not file with the county recorder of Polk county any such certificate to practice.” And the court instructed the jury in each case that if defendant did publicly profess to cure and heal, etc., in Polk county without having procured a license, and filed the same with the county recorder of Polk county, then the defendant might be found guilty.

The particular complaint for the appellants is that

the indictments charged a failure to file a license with the county recorder of Polk county, without any allegation that defendant was a resident of that county, and that the court instructed the jury in each case that the practice of medicine in Polk county by defendant without recording a license in that county would constitute a crime, although there was no allegation or proof that the defendant was a resident of that county. The construction of the statute relied upon for the defendants is unquestionably correct, for it is provided in Code, section 2577, that the certificate of license granted by the state board of examiners shall be filed for record "in the office of the recorder of the county in which he (the person licensed to practice) resides," and that "the same record must be made of the certificate in any county to which the holder may remove and in which he proposes to practice." Plainly, under these statutory provisions, a practitioner who has procured the proper certificate or license, and has had it recorded in the county of his residence, is entitled to practice in any county in the state, unless he is an itinerant physician as described in Code, section 2581; and he is required to have it recorded in another county only in the event of a change of residence. Neither the indictment nor the evidence negatives the residence of the defendants in another county in the state, and the fact alone of the practice of the defendants in Polk county without filing of a certificate in that county does not make out a case against the defendants in that respect.

But we think that any prejudice to the defendants from the error of the court in the instructions to the jury in the matter here referred to is clearly negated by the record. The indictments sufficiently charged the defendants with practicing in Polk county without having a certificate from the proper authorities so to practice. If

1. PHYSICIANS:  
license:  
recording.

2. SAME:  
indictment:  
surplusage.

the defendants did not have such certificates then their practice in Polk county or any other county in the state was unlawful without regard to the filing of a certificate in Polk county or any other county; for, if defendants did not have certificates, no such certificates could be filed anywhere. The charge of practicing without having procured certificates is fully made out in the indictment, and the additional charge of failure to file with the recorder of Polk county is in this respect surplusage. The charge of illegal practice of medicine, so far as these defendants are concerned, is fully made out by the allegation that they practiced medicine in Polk county without having any certificate entitling them to so practice.

Now it appears from the record that the defendants had no certificates whatever from the board of medical examiners of the state. They were, therefore, not entitled to practice medicine in any county of the state, and the county of residence was necessarily immaterial. The jurors could not have possibly predicated their verdicts on the failure of the defendants to record certificates in the proper county. They can not, therefore, complain that, with reference to the recording of certificates which confessedly they never had, the jurors were improperly instructed.

II. There is also a complaint for appellants that the jurors were improperly instructed as to what constitutes a practice of medicine without a certificate as provided by the statute. In each case the court properly defined the practice of medicine, as described by Code, section 2579, and in several instructions told the jury, in effect, that, under the statute, it is unlawful without a certificate to "profess to be a physician, surgeon or obstetrician and assume the duties" of such profession or to make "a practice of prescribing or furnishing medicine for the sick," or to "publicly profess to cure or heal." But the court further instructed the jury that defendants might be convicted on a finding that with-

3. SAME: practice  
of medicine:  
license:  
instructions.

out certificates they "did publicly profess to cure or heal" or did devote themselves to and employ "means of curing and healing and alleviating pain," and, further, that defendants might be found guilty if it appeared that they "performed any services in a professional capacity in attempting to cure or heal or alleviate pain in those who applied" to them for treatment. The complaint of appellant in this respect is that persons, not physicians, may "devote themselves to curing, healing and alleviating pain" without any violation of the statute. And it is suggested that a nurse or a mother of an infant is not guilty of the illegal practice of medicine without a license, although devoted "to curing, healing and alleviating pain." It must be confessed that in using the language complained of the court did not accurately state the provisions of the statute, for we do not find in the statute any specific reference to the act of devoting one's self to and employing means of "curing and healing and of alleviating pain." It may well be suggested, however, that neither a professional nurse nor the mother of an infant devotes himself or herself to the employment of means of curing and healing and of alleviating pain.

However this may be, the record in this case shows without any possible ground of controversy that the defendants professed to be chiropractics, maintaining an office in Polk county, holding themselves out to treat and treating patients for disease, with the purpose of curing and healing, holding diplomas from a chiropractic school; and that they did so without having procured certificates from the state board of medical examiners. In view of these undisputed facts, it is plain that even in devoting themselves to and employing means of curing and healing and of alleviating pain without licenses they violated the statute. *State v. Heath*, 125 Iowa, 585; *State v. Corwin*, 151 Iowa, 420. While, therefore, the language used by the court, as above indicated, was in some respects inapt, it



could not possibly have misled the jury into the error of finding guilt without proof beyond a reasonable doubt that defendants either professed to be physicians or made a practice of prescribing and furnishing medicine for the sick or publicly pretended to cure or heal.

The contention in argument for appellants that one who advertises and holds himself out as a chiropractic is not within the provision of the statute unless he actually

4. SAME:  
application  
of statute.

undertakes in specific cases to cure and heal is not well founded. It is true that in *State v. Corwin, supra*, it appeared that defendant in that case not only advertised himself to practice according to that system, but also undertook in specific cases to heal. The statute applies equally to those who profess to be physicians and assume the duties of such profession and publicly profess to cure or heal and to those who make a practice of prescribing for the sick. That defendants did make a practice of prescribing their method of treatment for sick persons appears for their own testimony; but whether they did so or not, if they held themselves out as publicly professing to cure or heal, they were required to have certificates.

Finding no error in the record which could possibly prejudice the defendants in the presentation of their cases to the jury, we reach the conclusion that the conviction in each case must be, and is,—*Affirmed*.

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STATE OF IOWA v. FRED BUTLER, Appellant.

**Criminal law: RAPE: INCLUDED OFFENSES: SUBMISSION OF ISSUES.**

1 On a prosecution for rape committed upon a girl under the age of consent, the indictment making no charge of the use of force and violence, the issue of assault and battery was not included and failure to submit the same was not erroneous.

**Same: INSTRUCTIONS.** Where there is a reasonable doubt of defend-

2 ant's guilt of the crime as charged he can only be convicted of the lower degree. The court's instructions in this case when construed as a whole gave the defendant the benefit of the statute in this respect.

**Same:** PRODUCTION OF WITNESSES ON NOTICE: SUFFICIENCY OF NOTICE.

3 Defects in a notice of the calling of a witness not before the grand jury are not fatal unless prejudicial to the defendant. In this instance the name of the witness was not correctly written in the notice, nor was the occupation given other than as wife, but the notice gave her residence and what she would testify to, so that the defendant could not have been misled as to her identity, and it was therefore sufficient.

**Witnesses:** COMPETENCY. Deafness will not disqualify a witness  
4 otherwise competent.

*Appeal from Webster District Court.*—HON. C. G. LEE,  
Judge.

TUESDAY, NOVEMBER 12, 1912.

THE defendant, having been convicted of the crime of rape, appeals.—*Affirmed.*

*Frank Maher, M. M. Joyce, and Kelleher & O'Connor,* for appellant.

*George Cosson, Attorney General, John Fletcher, Assistant Attorney General, and B. B. Burnquist, County Attorney,* for the State.

LADD, J.—I. The indictment charged that defendant, on or about September 21, 1910, "did wilfully, feloniously, and unlawfully assault one Vera Butler, and did then and there carnally know and abuse the said Vera Butler, she being then and there a female child under the age of fifteen years." The court advised the jury that included in the offense charged was that of assault with intent to com-

1. CRIMINAL LAW:  
rape: included  
offenses: sub-  
mission of  
issues.

mit rape, and also that of unlawful assault, but did not mention assault and battery, nor submit whether he was guilty thereof to the jury. Appellant argues that this was error, insisting that this offense was included in the allegations of the indictment and sustained by the proof. It will be observed, however, that the use of force and violence in the perpetration of the offense was not averred, and, even though the evidence may have disclosed the exertion of some force, as assault and battery was not included in the charge against the accused, there was no issue as to his guilt thereof, and for this reason it was not error to omit submitting the same to the jury. *State v. Miller*, 124 Iowa, 429; *State v. Johnson*, 133 Iowa, 38.

II. Section 5377 of the Code declares that, "where there is a reasonable doubt of the degree of the offense of which defendant is proven guilty, he shall be convicted of the lower degree only," and with reference thereto the court instructed that "included in the charge of rape are the following lesser offenses, which are stated in the order of their gravity, as follows: (1) Assault with intent to commit rape; and (2) an unlawful assault. It is the law that where a person is charged with a crime, which charge includes offenses of a lesser degree, the jury shall find the defendant guilty of the highest offense charged of which the evidence proves him guilty beyond a reasonable doubt, if it does so prove him guilty of any such offense." The criticism of this instruction is that "it does not tell the jury that where there is a reasonable doubt as to the degree of the offense the conviction should be for the lesser." It is a little difficult to understand how the jury might exclude all reasonable doubt in convicting of a higher offense, without saying that no such doubt existed as to the degree. The court might well have indicated the law by quoting this statute; or more pointedly have expressed the precise rule on the subject. But other portions of the charge were such as to ob-

viate any possible misconception of what was intended. Thus, in the fourth instruction, the elements constituting the crime of rape were stated, and the jury told that, unless each and all of these had been proven beyond reasonable doubt, the accused should not be convicted of having committed that crime. This instruction was followed by another saying that, in event of conviction of rape, the lesser offenses are not to be considered; but, if not guilty thereof, the jury should proceed to inquire whether he was guilty of an assault with intent to commit rape, and that, unless found beyond reasonable doubt to have so assaulted prosecutrix, he should not be convicted of this offense. In the seventh instruction, the necessity of proving penetration beyond reasonable doubt, to constitute rape, was pointed out, and, in the event this were not done, then of so proving the assault with intent to penetrate. In the ninth instruction the jury was told, if the defendant was not found guilty of either of the above offenses, to determine whether he was guilty of the simple assault. The charge as a whole preserves to the defendant the advantage of the statute quoted, and was without error in this respect.

III. The name of Mary Engels was not indorsed on the back of the indictment, and, when she was called as a witness, objection was interposed on this ground. It

appeared that a notice had been served on defendant a sufficient time previous to the trial, but therein she had been designated as "Mrs. J. C. Ingalls, wife of J. C. Ingalls, living on 23d street, Ft. Dodge," and that among other things, she would testify that "she had been living in the house first north of the Fred Butler house during the past year, and that she had seen Mrs. Fred Butler leave the home, and leave Vera Butler alone." It appeared at the trial that her husband's name was Chris E. Engels, but by mistake she had given her name to the county attorney as "Mrs. J. C. Engels," and that she had lived during the

3. SAME: produc-  
tion of wit-  
nesses on  
notice:  
sufficiency of  
notice.

year previous in the house immediately north of that occupied by the defendant on Twenty-third street. She had a son named C. J. Engels, who resided in another part of the city, and had never lived in the place designated in the notice.

The statute requires such a notice to give the name, place of residence, and occupation of a witness whose testimony is to be introduced (section 5373, Code), but defects of the notice in these respects are not fatal, unless prejudicial to the defendant. Here the notice not only designated the street on which the witness resided, but indicated she would testify that she had resided next door to defendant's place of residence during the year previous. Only she and her husband had lived there during that time. The defendant, then, could not have been misled as to who was intended even though her name was not written correctly, nor her occupation stated, otherwise than that of wife. He was advised with sufficient certainty of detail to enable him readily to ascertain the identical person whom the state proposed to call as a witness, and of the substance of the testimony to be given, and, this having been done, the defendant was not prejudiced by the defects of the notice. See *State v. Rainsbarger*, 74 Iowa, 196; *State v. Mathews*, 133 Iowa, 398.

IV. The suggestion that the deafness of Mrs. Ather-ton rendered her incompetent to testify is without merit. Even a deaf mute, if of sufficient mental capacity and able to communicate his ideas by signs or in writing, is a competent witness. *State v. De Wolf*, 8 Conn. 93 (20 Am. Dec. 90); *State v. Weldon*, 39 S. C. 318 (17 S. E. 688, 24 L. R. A. 126); *State v. Howard*, 118 Mo. 127 (24 S. W. 41). The corroborating evidence was sufficient to carry that issue to the jury, and the verdict has such support as to preclude any interference therewith on appeal.

4 WITNESSES:  
competency.

The record appears to be without error, and the judgment is—*Affirmed*.

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CHARLES R. HUNTER, Appellee, v. THE CITIZENS SAVINGS  
& TRUST COMPANY, Appellant.

**Judgments: EXTENT OF LIEN.** A judgment lien is purely a creature of  
1 the statute, which is applicable alike to both legal and equitable in-  
terests in lands; but the lien does not attach to the land or create  
any property right in the judgment creditor; it simply attaches to  
the debtor's interest in the land, and if his interest is subject to any  
infirmity or condition by which his interest ceases to exist the lien  
ceases with it.

**Same: INTEREST OF LEGATEE: EXTENT OF JUDGMENT LIEN.** Where the  
2 executors were empowered by the terms of the will to sell the  
real estate to pay debts and legacies, a judgment creditor of one  
of the devisees, who was given an undivided interest in the resi-  
due of the estate, acquired no lien upon the land by virtue of the  
judgment which could be enforced against it in the hands of a  
purchaser from the executors, even though he purchased with  
notice of the judgment; the purchaser taking title through the  
executor and not through the judgment debtor.

*Appeal from Johnson District Court.*—HON. R. P. HOW-  
ELL, Judge.

THURSDAY, NOVEMBER 14, 1912.

ACTION in equity to quiet title to real estate. Decree  
as prayed, and defendant appeals.—*Affirmed*.

*McDonald & Olsen, and O. A. Byington, for appellant.*

*W. J. Baldwin and S. K. Stevenson, for appellee.*

WEAVER, J.—The conceded facts of the case are as  
follows: One Rosa Weber, being the owner of a hundred

acre tract of land in Johnson county, Iowa, died testate December 25, 1909. Her will, which has been duly probated, first provides for certain legacies, and then proceeds to dispose of the residue of her estate in the following manner:

I will devise and bequeath all the rest, residue and remainder of my property after payment of the above legacies, which I may have at the time of my death of whatever kind, nature or description, real, personal or mixed to be equally divided among my eight children now living, each to receive one-eighth; to my son, William, one-eighth; to my son, Frank, one-eighth; to my son, George, one-eighth; to my son, Eddie, one-eighth; to my daughter, Mary Bothell, one-eighth; to my daughter, Annie Frisbie, one-eighth; to my daughter, Lizzie Weber, one-eighth.

#### Codicil.

I name and appoint my son, William Weber and A. B. Frisbie, my son-in-law, to be the sole executors of this will and my estate without bond and authorize and empower them to sell my real estate and sign a deed therefor as fully and completely as I myself could do. And said deed when so signed shall convey all right, title or interest I have in any of my real estate at the time of my death, and no bond shall be required for the sale of said real estate or other purposes.

In the exercise of the power conferred upon them by the foregoing devise the executors on April 8, 1910, entered into a written contract to sell and convey said land to Charles R. Hunter, plaintiff herein, and thereafter on March 1, 1911, a deed of conveyance in pursuance of said contract was made and delivered. It further appears that the land was incumbered by a past-due mortgage of \$2,500, and that other valid claims to the amount of \$400 were outstanding against the estate. The testatrix left no personal property available for the payment of debts, and said land constituted the only fund from which means

could be derived for the proper administration and settlement of the estate. At the time of making the deed to plaintiff he paid the agreed purchase price of the land, except the sum of \$500, which was deposited with the defendant bank to secure the payment of claims which might be established against the estate during the time allowed therefor by law. At the same time the executors entered into a bond to plaintiff to protect him against any adverse claims which might be asserted against the land by judgment creditors of the beneficiaries under the will. It further appears that on May 25, 1906, and in the lifetime of the testatrix, the defendant bank obtained a judgment in the district court of said county against W. A. Weber (who is the William Weber named in the will) for \$307, with interest and costs, and that said judgment has never been paid or otherwise discharged. The defendant, asserting that upon the death of the testatrix its judgment became a lien upon the land or upon such interest therein as was acquired by W. A. Weber, caused execution to be issued and levied upon the property under date of May 18, 1911, whereupon plaintiff served written notice upon the defendant of his claim of ownership free and clear from the alleged lien, and, having tendered to defendant the sum of \$1.25 as provided by statute to cover the expense of making the conveyance, demanded the execution and delivery to him of a quitclaim deed. Said demand being refused, this action was begun to settle the rights of the parties, and quiet the title in plaintiff. The defendant's answer, briefly stated, is a reassertion of the existence of its alleged judgment lien which it asks the court to affirm and establish by its decree. The trial court found for the plaintiff that the judgment was not a lien upon the lands in his hands. To obtain a reversal of that holding, the defendant appeals.

A judgment lien is a creature of the statute, and, except as there provided, none exists. Our statute (Code,



section 3801) provides that judgments in courts of record are liens upon real estate owned by the defendant at the time of such rendition, and also upon all he may subsequently acquire for the period of ten years from that date. This has been held applicable to both legal and equitable interests in lands. *Brebner v. Johnson*, 84 Iowa, 23.

1. JUDGMENTS:  
extent of  
lien.

But a judgment lien has no effect to create any property right in the judgment creditor. It does not attach to the land as distinct from the title held or obtained by the debtor. His lien simply gives him a prior right as against a general creditor to enforce his claim by levy upon and sale of the debtor's legal or equitable estate in the land, but he can not seize, sell, or acquire any greater interest than is owned by the debtor himself. If there be any equities, limitations, or conditions attaching to the debtor's title which would defeat it in the hands of the debtor himself, it would be subject to the same infirmities and liabilities in the hands of the purchaser under such levy. Even if the debtor has some real or apparent interest in land to which the lien is attached, yet if his title has been so qualified in the instrument creating it that it may be defeated or divested by a power intrusted to another, and it is in fact thereafter so defeated or divested, the lien falls with it, and the creditor can not pursue the property in the hands of a third person who has acquired it through the exercise of that power. This not only the reasonable rule, but is we think sustained by all the authorities. The thought will perhaps be more clear if we keep in mind the fact that a judgment lien does not attach to the land, but to the judgment debtor's interest in it, and, if that interest be subject to any infirmity or condition by reason of which it is eliminated or ceases to exist, the lien attaching thereto ceases with it. *Beaver v. Ross*, 140 Iowa, 154; *Thomas v. Kennedy*, 24 Iowa, 405; *Bucknell v. Deering*, 99 Iowa, 548; *Holden v. Garrett*, 23 Kan. 98; *Shipe v. Re-*

*pass*, 28 Gratt. (69 Va.) 716; *Sinclair v. Sinclair*, 79 Va. 40; *Snyder v. Martin*, 17 W. Va. 276 (41 Am. Rep. 670); *Scudder v. Voorhiss*, 5 Sandf. (N. Y.) 271. Applying this principle, the New York court in *Moore v. Pitts*, 53 N. Y. 86, where a lien was sought to be enforced against one Hall, says: "It is obvious that the lien of Gilman's judgment could only attach to such estate as Hall had in the premises. If that estate was subject to be divested by the breach of any condition subsequent, any such breach that would divest the estate would of necessity destroy the lien." See, also, *Ackerman v. Gordon*, 67 N. Y. 63; *Rose v. Hatch*, 125 N. Y. 427 (26 N. E. 467); *Leeds v. Wakefield*, 10 Gray (76 Mass.) 514; *Smyth v. Anderson*, 31 Ohio St. 144; *Baker v. Copenbarger*, 15 Ill. 103 (58 Am. Dec. 600); *Wetmore v. Midmer*, 21 N. J. Eq. 242; *Morse v. Bank*, 47 N. J. Eq. 279 (20 Atl. 961, 12 L. R. A. 62); *Mayo v. Merritt*, 107 Mass. 505.

The application of this rule to the case at bar is too clear to require argument. The will did not devise the land to the beneficiaries therein named. It gave them no more than a specified share in the residue of the estate. It may be presumed that the testatrix knew that she was leaving no personalty with which to pay her debts and the legacies provided for in her will and that a sale of the land would doubtless be necessary for a proper settlement of her estate; but, even if such be not the case, she had the undoubted right to confer upon her executors a power of sale, and so long as the estate remained unsettled, and the executors were still in the active exercise of their trust, no devisee under the will could dispose of any part or share of the land and invest the purchaser with title or estate therein which would not be defeated and rendered ineffectual by a conveyance by the executors under the testamentary power conferred upon them. This is squarely held in the half dozen cases last above cited. It is

a. SAME: interest  
of legatee:  
extent of  
judgment lien.

immaterial whether we adopt the view that, by reason of an application of the doctrine of equitable conversion, the entire property is to be treated as personalty, or adopt the other theory that the beneficiaries under the will took an actual legal or equitable estate in the land. In the former case there would be no lien which could affect the land in the hands of a grantee in a conveyance by the executors. In the latter case the estate or interest held by the debtor in the land would be divested by the executor's deed, and his only right in the premises would be his right to his proper share of the proceeds of the sale or rather to his proper share in the distribution of the residue of the estate after paying the legacies and making due settlement of claims and expenses of administration. With the extinguishment of the debtor's interest in the land the creditor's lien was also extinguished.

Without quoting largely from the precedents, it may be said that their general purport is fairly reflected in *Morse v. Bank*, 47 N. J. Eq. 279 (20 Atl. 961, 12 L. R. A. 62), a case in which the facts are much like those shown in the record before us. There the will authorized the executor to sell and convey. A judgment creditor levied an execution upon the fractional interest of a devisee, and obtained a sheriff's deed therefor. Subsequently the executor exercising the power given him by the will sold and conveyed to another purchaser. Upholding the latter conveyance the court says: "By the purchase at the sheriff's sale, complainant acquired only Richard's estate as an heir at law, subject to the trust and power of sale contained in the testator's will. If the power of sale subsisted and was capable of being executed at the time of the sheriff's sale, the purchaser at the executor's sale took a title under the testator's will paramount to any estate derived from or through the heir." The decision in *Wetmore v. Midmer*, 21 N. J. Eq. 242, is also very closely in point upon the question before us. The case

of *Atlee v. Bullard*, 123 Iowa, 274, cited by appellant, is not in point. There no attempt was made to exercise the testamentary power, but all parties in interest united in treating the property as land owned in common and entered into a partition of the same as such. The question as to the effect of the power upon the rights of the parties was not suggested until controversy arose over the adjustment of liens in distributing the proceeds of the partition sale, and we held that the point was raised too late. The decision in *Williams v. Lobban*, 206 Mo. 399 (104 S. W. 58), also relied upon by the appellant, does not sustain its contention for the opinion expressly recognizes the principle that the heir's right and title to the land may be divested by the exercise of the power contained in the will. Counsel seem to argue upon the theory that the executors in exercising the powers given to them were selling and conveying the property of the devisees, and, as the latter could not have avoided the lien had they themselves made the conveyance, the same result must follow a conveyance by the executors. This view wholly ignores or misapprehends the nature of the estate or interest created by the will. As we have already mentioned, the will makes no specific devise or disposition of the land. The gift to W. A. Weber is limited to the right to an equal one-eighth share of the residue of the estate after paying legacies, debts, and expenses of administration, and this gift is made subject to the power of the executors to sell and convey. But the title conveyed under the power is not the title of the devisee. It is the title of the testator which passes to the purchaser directly from the testator through the executors, and not through the heirs. The power and authority of the executors to sell and convey being clearly paramount, its exercise eliminates or defeats the inferior or imperfect title, if any they had, of the devisees, and as a necessary consequence the lien, if any, attaching to such inferior or imperfect title, is extinguished

with it. In this connection it is immaterial whether the true theory be that the executors took the title to the land for the purposes of their trust, or whether they be considered as the devisees or depositories of a power only, or whether the effect of the devise was to work an equitable conversion of the realty into personalty. By either route we are inevitably led to the same result. Many of the authorities are reviewed by this court in *Beaver v. Ross, supra*, and the conclusions there announced are in harmony with the views we have here expressed.

The point made by appellant that plaintiff purchased the land with notice of the claim asserted by appellant is not controlling. If the judgment was a lien which would follow the title in the hands of a grantee in an executor's deed, he would be held to have had at least constructive notice of it and could not be heard to object to its enforcement, but if, as we have said, there was no lien or if there was a lien, and it was such as would be extinguished by a conveyance under the paramount power, there is no rule of law or principle of equity which would forbid his taking such conveyance and insisting upon holding the title free from the claims of the alleged lien holder.

The equities of the case as argued by counsel for appellant growing out of the claimed fact that the sale was made by the executors for the purpose of cheating and defrauding the judgment creditors of the devisees are not very persuasive. We do not hold, nor must anything we have said be so understood, that the property or the property rights which the devisees obtained under the will are not liable to be subjected to the claims of their creditors. Our decision only goes to the proposition that a judgment creditor acquires no lien or claim upon the land left by the testator which can be asserted or enforced against it in the hands of one to whom it has been conveyed by the executors in the exercise of power conferred upon them by the will. Beyond that we need not go. The creditors

have neither legal, equitable, nor moral rights to any greater interest or estate in the property than their debtors acquired under the will. It was the undoubted right of the mother in making her will to burden or limit the estate she was giving her children by such lawful conditions and limitations as to her should seem wise. She was under no obligations to provide for the payment of their debts or to protect their creditors, and, if the conditions or limitations imposed by her made the subject of the devise less available or more difficult of subjection to the payment of their claims, it was within her right so to do, and affords them no just ground of complaint. *Meek v. Briggs*, 87 Iowa, 620.

It is unnecessary to further pursue the discussion. What we have said sufficiently indicates our conclusion that the trial court was not in error in holding that, upon the agreed facts, the appellant's judgment constitutes no lien upon the land in the hands of the plaintiff.

The decree below is therefore—*Affirmed*.

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STATE OF IOWA, v. O. H. P. SHOEMAKER, Appellant.

**Criminal law: ABORTION: NECESSITY TO SAVE LIFE: EVIDENCE.** On the prosecution of a physician for abortion the burden is upon the state to negative the defendant's good faith exercise of his best skill and understanding, believing the operation necessary to save the patient's life. In the instant case the evidence is held insufficient to show that defendant did not in good faith and in the exercise of skill and understanding believe that the operation was necessary to save the life of the patient.

*Appeal from Polk District Court.*—HON. C. S. BRADSHAW,  
Judge.

THURSDAY, NOVEMBER 14, 1912.

THE defendant was convicted of having attempted to produce a miscarriage, and appeals.—*Reversed and remanded.*

*Sullivan & Sullivan*, and *W. S. Shoemaker*, for appellant.

*George Cosson*, Attorney General, and *John Fletcher*, Assistant Attorney General, for the State.

LADD, J.—The defendant, a practicing physician of Des Moines since 1883, is charged in the indictment with having attempted to produce a miscarriage on Stella Thorne about October 19, 1910. He admitted having used an instrument to relieve the womb of the foetus, but claimed to have done so, to save life. As the foetus was emitted two days later, the main issue was whether defendant, in the exercise of his best skill and understanding in good faith, believed a miscarriage necessary to save the life of Stella Thorne. The burden of proof was on the state to negative such alleged necessity (*State v. Aiken*, 109 Iowa, 643), and a careful examination of the record has convinced us that it has failed to so prove.

Stella Thorne was an unmarried woman about twenty-two years of age, and had been pregnant for three or four months when she first called on the defendant at his office. At that time, according to her testimony, she told him of her condition, and he promised to help her all he could, but said, if she was after an abortion, he could not perform it, felt her pulse, ascertained her temperature, and informed her she was in bad condition, looked like she had anæmia and declared she had already aborted, and needed assistance to take the foetus away. He then said he must have \$50 before he would do anything, and when she said she was without means, offered to accept part down and the remainder later. He also required her to

employ a nurse, because her heart was weak. On Tuesday evening following she was accompanied by Harvey Ramey, who paid him \$35 and executed his note for the remaining \$15. The defendant then examined her, and on the next evening the operation was performed, and two days later the fetus was expelled. The witness further testified that she had not worked during the two weeks previous, but had walked down town nearly every day; that she had been taking medicine previously to produce an abortion, prescribed by a male and also a female physician; that she had said as much to him; that upon examination he had informed her that she was in pretty bad condition, had anæmia, that her heart was weak, and that she had already aborted septic matter, and needed some assistance to take that away; and that she must have a nurse and "He said it might be dangerous for me to wait three or four days, and he took me and made an examination in the private room, and when he examined me he found pain on the left side of my womb, and I had pains in my back and back of my head. After he made the examination, he found my womb standing wide open, and there was abrasions of the membranes around the womb, and that the membranes had been broken or abraded, and he said that it would be dangerous in that condition to let it remain very long, as it might kill me; that that thing that was in there would have to be taken away to save my life, and then I made arrangements to come down the next evening with the nurse, and I brought Miss Morris down." She also testified that she "was looking pale and sallow." That she had been complaining of being sick before calling on defendant appears from the testimony of Mrs. Clark, at whose house she was rooming, and Harvey Ramey testified to her having nearly fainted at a theater shortly before, and to her statement that she was taking medicine to cause a miscarriage. Ramey testified further that: "The doctor told me in her presence that it was



necessary for her to have a nurse, that she would have to be there the next evening, and the next evening Stella Thorne, the nurse, and myself came to the office again. When the nurse came, he explained to her that this was perfectly legitimate, and that it was necessary to have a nurse, because of Miss Thorne's weak condition, weak heart, and the taking of the medicines she had taken, and other things that she had done; and the doctor insisted that the nurse should stay with the girl from start to the finish, or he would not have anything to do with it, and I think the first time we were there he made an examination, and I was informed that evening that it was necessary for her to be operated on at once, and the next evening was set for the operation, and the nurse came. He was in there not very long during the operation, and after that he gave her some medicine to take under certain conditions, and how to take it." The nurse testified that, prior to the operation, defendant explained to her how to administer the medicines he had prescribed; that he told her Miss Thorne was pregnant, and that "he had to operate on her to save her life," and that when the child came he told her to cremate it, and, on cross-examination, that: "The doctor said, the night I was at the office, it was necessary to have an operation to save her life. He also said that it was an important point that I should stay about the patient and not leave her. He said that her heart was weak by the absorption of septic matter from the womb and other things. He said it was no crime that I was committing, but a necessary matter; that there was no secret about it. He did not ask me to be secret about it, or not tell anybody. He told me not to leave her alone for any length of time, and if there was any change or anything to notify him by telephone." This is all the evidence adduced by the state tending to negative the exception in the statute that the attempt to produce the miscarriage was to save life.

On the other hand, defendant testified that what he did was necessary to save the life of the patient, that she had anæmia from septic poisoning, and that septic poisoning came from the absorption from the uterus, and concerning the examination: "I looked her over again, as I do any patient, felt her pulse, put her in the chair, made a practical examination, and examination over the region by percussion, the abdominal region, and found tenderness on percussion. I found the uterus rolled down on the outside, and very much soreness on the right-hand side of the patient in the broad ligaments or uterine region. Then I also made what is called a vaginal examination, and found the vagina hot, sensitive, and very tender. I found the mouth open, and I passed the finger in and found the cervix wide open. I passed my finger clear through to the inner mouth, and found it open, and I found the membrane tampered with, with an instrument, a catheter, or something of that kind, and the womb swollen; that is, the neck swollen and very sensitive." It will be observed that his testimony is in harmony with that of the witnesses of the state. The evidence concerning the condition of Stella Thorne is in no wise refuted, save possibly by the circumstance that she had walked back and forth from the office of the accused, and prior thereto had walked down town. Whether this would have been improbable or impossible, with her condition as described, the jury had no means of knowing. The record does not warrant the conclusion that defendant was "framing up" a defense in event of prosecution, and, while appreciating the difficulties under which the state labors in this kind of a prosecution (*State v. Lee*, 113 Iowa, 348), we are not ready to sanction a conviction without *prima facie* proof, at least, that the miscarriage attempted was not necessary to save life.

Owing to our conclusion on this phase of the case, an examination of other errors assigned is not necessary.

Because of the insufficiency of the evidence to justify the conviction, the judgment is reversed.—*Reversed and remanded.*

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W. J. BARCLAY, et al., v. THE SCHOOL TOWNSHIP OF  
WAPSINONOC, et al., Appellants.

**Schools: NOTICE OF BOARD MEETINGS: SUFFICIENCY OF NOTICE.** The  
1 statute providing that a special meeting of the board of school directors may be called upon notice of the time and place, delivered to each member in person, does not contemplate the mailing of notice to the members; and an attempt to serve notice by mail which does not reach the member to be notified is insufficient, notwithstanding the good faith of the secretary of the board in attempting to give the notice; and the proceedings of the board in the absence of a member to whom legal notice of the meeting was not given are invalid.

**Same: SALE OF SCHOOL PROPERTY: POWER OF ELECTORS: INJUNCTION.**  
2 The statutes expressly confer upon the electors of a school corporation, at the annual or a special meeting duly called for that purpose, power to direct the sale or other disposal of any school house or site, or other property belonging to the corporation; and a court of equity will only interfere with an exercise of this power, when the question, properly submitted, presents a clear ground of equitable relief. The mere fact that a school house had been built but never used for any purpose does not create in the taxpayer a vested right therein which will prevent a sale by the electors.

*Appeal from Muscatine District Court.*—HON. A. P. BAR-  
KER, Judge.

FRIDAY, NOVEMBER 15, 1912.

THIS suit in equity was instituted by certain electors and taxpayers of the defendant school township to set aside the action of the electors of said township in voting and directing the sale of a school building, and to restrain the members of the board of directors of the township who are made defendants with it from selling or

otherwise disposing of said school building. There was a decree for the plaintiffs, and defendants appeal.—*Affirmed.*

*E. F. Richman* and *E. M. Warner*, for appellants.

*E. C. Nichols*, for appellees.

MOCLAIN, C. J.—In March, 1906, at the regular annual meeting of the electors of the defendant school township, a tax of \$8,000 was levied on the taxable property in the township for the purpose of erecting a school building as near the geographical center of the township as practicable. In January of the following year, an action was instituted by certain qualified electors of the township to compel the board of directors to submit to the voters of the township a proposition to rescind the former vote. This action was determined adversely to the plaintiffs in that action. See *Kirchner v. Board of Directors*, 141 Iowa, 43. The new building was constructed and ready for occupancy in the spring of 1908, but it has never been occupied for school purposes; the separate schools in the seven subdistricts of the township being maintained in the buildings formerly used for that purpose. In October, 1909, at a special meeting of the board of directors, a special meeting of the electors of the township was called to vote upon the proposition to sell the central school building, and devote the proceeds to the repair of the old buildings in the various subdistricts, and at this special meeting of the electors the sale of the new building was ordered. The validity of the action of the board of directors in calling this special meeting of the electors is now assailed on two grounds: First, that at this special meeting of the board two directors were absent who had not been notified of that meeting as provided by law; and, second, that by the payment of the tax assessed for the purpose of building

the central schoolhouse as ordered at the annual meeting of the electors in 1908 the plaintiffs and other electors and taxpayers acquired a vested right to have the building equipped and used as a school building and that the electors had no authority at a subsequent meeting to order its sale. Incidentally it appears that in reliance upon the vote of the electors at a special meeting the new building has been sold for \$510, on condition that the injunction sought in the present action be denied.

I. It appears that on September 29, 1909, the secretary of the board of directors attempted to call a special meeting of the board to be held on October 2d, with refer-

ence to calling a meeting of the electors to  
1. **SCHOOLS:**  
notice of  
board meet-  
ings: suffi-  
ciency of notice.  
vote upon the proposition to sell the school  
building, and that he notified all of the  
directors but two of this meeting, and

that the directors thus notified were present at such meeting, while the two directors not formally notified were not present; and it is conceded that if, as to either of these two directors, there was an entire want of notice, then the action of the directors at this special meeting was invalid, and the action of the special meeting of the electors thus ordered was also invalid, and the relief asked in this action was properly granted. There is some doubt under the record whether one Herr, the president of the board, who was absent from the special meeting, was sufficiently notified or waived notice; but the lower court held there was no notice whatever to the other director who was absent (one Andersen), and, if this holding is sustained by the record, then we have no occasion to consider the objection made on account of the absence from the meeting of Herr.

It is provided in Code, section 2757, that special meetings of the board of directors of a school corporation may be called by the secretary at the written request of a majority of the board "upon notice, specifying the time and place delivered to each member in person, and attend-

ance shall be a waiver of notice." Now it appears that on the 29th of September, when the secretary of the board gave notice to other directors of the special meeting to be held on the 2d of October, he did not give notice of any kind to Anderson who was at his home on that day, the secretary being misled by erroneous information derived from another person that Anderson was not at home and could not be reached personally; and that the secretary thereupon deposited in the mail, properly addressed to said Anderson, a letter notifying him of such proposed meeting, which letter was never, in fact, received by Anderson, who left home on the morning of the following day, and was absent from the state until after the proposed meeting was held.

The statute evidently contemplates some form of specific personal notice on each member. Whether this notice must be in writing, or whether it may be waived otherwise than by attending the meeting, we need not now determine, for no actual notice of any kind was given to Anderson, and he had no information as to the proposed meeting. The statute does not authorize a mailing of notice, and, in the absence of any such authority, we are unwilling to hold that an attempt to give notice by mail, which does not reach the member to be notified, is sufficient.

It is contended that the secretary made reasonable effort under the circumstances, as they appeared to him, to give notice to Anderson, and that, had further effort been made after the 29th of September to serve him with personal notice, such effort would have been unavailing to secure his attendance, for the reason that he was absent from the state. It is sufficient to say that the statute does not provide that reasonable effort to give notice shall be sufficient. The personal delivery of some form of a notice is required. When it appeared to the secretary that such notice on Anderson was impracticable with refer-

ence to a meeting on the third day following that on which notice to the other directors had been given, he still had the power to call a meeting of the directors at a later date of which notice might be given. It does not appear that Anderson had permanently left the state; on the contrary, he, in fact, returned to his home within a few days after the special meeting of the board was held. It was not therefore impracticable for the secretary to have called the special meeting of the board at such time as that notice thereof on Anderson could have been given. On account of the failure to give proper notice to Anderson, the special meeting of the board was not lawfully called, and its action in submitting to the electors the proposition to sell the school building was therefore invalid.

Counsel on each side of the case argue at some length the question whether the electors would have had authority at a special meeting properly called to practically rescind

2. SAME: sale of school property: power of electors: injunction.

the previous action of the electors authorizing the erection of the school building by ordering its sale and we are specially asked to affirm the ruling of the lower court, holding that, after the erection of the building, the taxpayers acquired a vested right to have such building used for school purposes which can not be defeated by subsequent action of the electors. If the taxpayers have such a vested right, it would no doubt be desirable that we now so declare in order that further controversy as to the sale of the building be avoided. The taxpayers of the school township would certainly be subjected to a hardship if a school building, costing \$8,000, is sold before it has ever been used for school purposes, and for a comparatively insignificant amount, in order to devote the proceeds to the improvement of other school buildings which were already in existence before the action of the electors was taken with a view to the substitution of a new central building for the existing buildings in the subdistricts. But we are

far from satisfied that a court of equity has authority to interfere with the action of the electors at a regular annual meeting or a special meeting duly called to which the proposition may be submitted for the sale of such school building.

The authority to direct the sale or other disposal of any schoolhouse or site or other property belonging to the corporation is expressly conferred upon the voters at an annual meeting or a special meeting to which such proposition may be submitted. See Code, sections 2749, 2750, as amended. Certainly a court of equity should interfere with the action of the electors on a matter properly submitted to them for consideration only when some clear ground of equitable relief is presented. It will not do to say that, when a school building has been erected in pursuance of the action of the voters it can never be possible under changed conditions for the electors to order the sale of such building and the use of the proceeds for other legitimate purposes. How can a court determine whether there has been such change of condition as to justify the electors in ordering the sale of a building already constructed? Can a court say that it is reasonable for the electors to order the sale of a building after twenty years, or fifteen years, or ten years, and unreasonable to do so after three years have expired?

Much reliance is placed upon what is said by this court in *Benjamin v. District Township of Malaka*, 50 Iowa, 648, and *Kirchner v. Board of Directors*, 141 Iowa, 43, with reference to the vested right of a taxpayer to have the school building, to the erection of which he has contributed, devoted to the purposes for which it was erected. In the first of these cases the point actually decided was that a taxpayer might in a proceeding by mandamus compel the directors to carry into effect the action of the electors in appropriating money for the erection of a school building. It does not appear in that case that the electors subsequently attempted to rescind their action or order the



sale or other disposition of the building for which money had been appropriated. What is said in that case with reference to a subsequent rescission by the electors of their action in relation to the erection of a schoolhouse appears to have been pure dictum. In the *Kirchner* case it was held that a court would not interfere with the discretion of the board of directors in failing or refusing to call a special meeting of the electors on the petition of more than a majority of them to vote upon a proposition to rescind a former vote of a tax to build the schoolhouse to which the present controversy relates. As an additional reason for not granting the relief prayed in that action, this court said that as a legal proposition the rights of the taxpayers after the tax for the erection of the building had been paid were vested, and that such rights could not be disturbed by a vote rescinding the previous action of the electors. This expression of view was also in the nature of a dictum, for, having held that the board had a discretion as to whether it would call another meeting of the electors to vote on the proposition to rescind their previous action, there was no direct occasion to say that if the electors did, in fact, vote to rescind, such vote would be illegal. In *Hibbs v. Board of Directors*, 110 Iowa, 306, it was held that the electors at a regular meeting might rescind their action taken at a previous regular meeting ordering the collection of a tax for the construction of a school building which had not been certified or collected, the reason assigned being that the taxpayers had not yet, by the payment of the tax, acquired any vested right. What was said in the case with reference to vested right, with a citation of the *Benjamin* case, is only an implied recognition of the doctrine, and amounts to no more than a holding that, whatever may be its force in a proper case for its application, it was not pertinent to the facts under consideration. The appellant with reference to this proposition relies upon *School District No. 6 v. Aetna Insurance Co.*, 54 Me. 505,

which seems to support the contention that a court can not interfere with the discretion of the electors to act as authorized by statute in reference to the disposition of a building constructed by tax levied for that purpose. We are not now satisfied that we should follow or adhere to the views expressed in the two cases in this court above cited as to the vested rights of the taxpayers in a school building erected in accordance with the vote of the electors, and hold that, under no circumstances, can the electors at a subsequent meeting order the disposition by sale of a building so erected. We concede the desirability of having this unfortunate controversy as to the maintenance of a central school building definitely settled, but we are not willing to assert for the courts such a power of supervision over the duly expressed will of the electors as is contended for in this case.

For the reasons pointed out in the first division of this opinion, the action of the trial court is—*Affirmed*.

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**ANNA E. STALEY v. GEORGE S. FORREST, Appellant.**

**Automobile accident: NEGLIGENT OPERATION: LIABILITY.** The operation of an automobile at a dangerous rate of speed, in view of a curve in the street, and running the machine directly toward the driver of a horse in such a manner as likely to frighten a reasonably safe horse, and which resulted in the fright of the horse, causing it to jump aside to avoid collision and thus overturn the vehicle and injure the occupant, was actionable negligence, for which the operator of the machine was liable.

**Damages: PERSONAL INJURY: JUDGMENTS: ERRONEOUS ALLOWANCE OF INTEREST.** Interest should not be computed from the date of an injury on an award of damages for pain and suffering, and an instruction authorizing the same was erroneous. In the instant case judgment was entered on the verdict including such interest, but on a motion for new trial on that ground the court eliminated the erroneous allowance, which was ascertainable, and entered final judgment for the balance as of the date of the original judgment.

ment. *Held*, that this was the equivalent of granting a new trial on condition that plaintiff should not accept judgment for the reduced amount, and was a substitute for the judgment first entered and was proper.

*Appeal from Hardin District Court.*—HON. C. G. LEE,  
Judge.

FRIDAY, NOVEMBER 15, 1912.

ACTION to recover damages for injuries received by plaintiff as a result of alleged negligence on the part of defendant in operating an automobile. There was judgment for plaintiff, from which defendant appeals.—*Affirmed.*

*Lundy, Wood & Baskerville*, for appellant.

*Bryson & Bryson*, for appellee.

McCLAIN, C. J.—The material allegation of negligence on the part of defendant which was submitted to the jury was that defendant operated his automobile at an unreasonable and dangerous rate of speed on a street of the city of Iowa Falls, approaching plaintiff who was driving a horse and buggy from the opposite direction on such street, causing the horse of the plaintiff to become frightened, upsetting the buggy, and throwing the plaintiff out, with the result that her arm was broken.

I. The contention that the verdict for the plaintiff is without support of any evidence in the record tending to show negligence of the defendant need not be considered at any great length. Although the plaintiff's own testimony as to what she observed in the excitement of the moment as she came around a curve onto the street and was met by the defendant in his automobile does not tend very

I. AUTOMOBILE  
ACCIDENT:  
negligent  
operation:  
liability.

strongly to establish negligent conduct on the part of the defendant, nevertheless, there was testimony of a witness who was in a position to observe the circumstances, from which the jury might well have believed that at a rate of speed which was dangerous and negligent, in view of the curve in the street at the approach of a bridge, defendant ran his machine directly toward the plaintiff in a manner calculated to frighten even a reasonably safe and well-trained horse, and that as a result of this conduct of defendant, which might well have been anticipated, plaintiff's horse was frightened, and jumped aside to avoid an imminent collision, upsetting plaintiff's buggy, and causing the injury complained of.

In this connection we may notice an assignment of error relating to the admission of the evidence of a witness who was allowed to testify as to the speed at which the defendant's automobile was being operated at the time of the accident; the claim made being that the witness did not show himself competent to give an opinion as to the rate of speed. The point is not pressed in argument, and an examination of the testimony of the witness shows that it is not well taken. The witness clearly showed such competency as to justify the court in receiving the evidence.

II. As to the amount of damages which might be allowed, the jury was instructed to take into account pain and suffering already endured by the plaintiff, if any, and

such pain and suffering as it was reasonably certain from the evidence would be endured by her in the future, if any. And the jury was then directed that on determining the amount allowed as damages interest should be computed on that amount from the time of the injury and be added to the amount of the damages, and that the sum thus ascertained would be the amount of the verdict.

It is conceded that this instruction was erroneous, for the reason that it directed interest to be computed from the

2. DAMAGES: personal injury: judgments: erroneous allowance of interest.

time of the injury on the amount allowed for future pain and suffering. *Jacobson v. United States Gypsum Co.*, 150 Iowa, 330.

The jury, in fact, returned a verdict for \$1,236.60, and judgment was immediately entered for the plaintiff in that sum. On a motion for a new trial, this error was called to the attention of the court; and the judge, in ruling upon such motion which covered also other grounds for new trial, filed a finding in which the error of the instructions as to the allowance of interest was attempted to be corrected by the reduction of the verdict so as to eliminate the item of interest which it was presumed the jury had included in its verdict covering the period from the date of the injury to the date on which the verdict was rendered. It is proper to say in explanation of the action of the judge that the decision of this court in the case above cited was announced between the time of the giving of the instruction and the time of ruling on the motion. In connection with the filing of this written finding by the judge ruling on the motion for a new trial, a judgment entry was made reciting that:

By agreement of parties entered of record in term time, the motion for new trial in this cause was to be submitted in vacation and ruling and entry made as of the date of said agreement. The motion for new trial having been submitted, and the court having considered the same and having filed its finding, it is now ordered that the said motion be overruled and that the plaintiff have and recover judgment for the sum of \$1,200 with interest at the rate of six percent from the date the verdict was returned into court, viz., the 26th day of January, 1911. To the overruling of defendant's motion and to all entries herein the defendant excepts.

The contention for appellant is that the judgment for \$1,236.60 entered on the verdict at the time it was returned was erroneous on account of the error in the instruction relating to interest, and that the court had no authority

to subsequently enter a corrected judgment, and that, as the first judgment was not set aside, a second judgment on the same verdict is necessarily erroneous. It is not contended, however, that the second judgment, if properly entered, does not eliminate the prejudicial error in regard to the allowance of interest. The sole question presented in this respect is as to whether the second judgment is valid; for, of course, it is of no validity if there remains on the record a prior judgment entered on the same verdict. It is clear that the court had the authority in ruling on the motion for new trial to determine that the verdict included an item of damage for which allowance should not have been made, and, as the court had directed the jury to include interest which should not have been included, the court might properly enter judgment for the amount of damages found by the jury, excluding the amount which it must be presumed the jury had included on account of the erroneous instruction as to interest. By agreement of the parties, the judge had authority in vacation to make such entry as the court might have made at the term, and that authority included the entry of judgment on the verdict for the proper amount. There was no occasion, therefore, to award a new trial on condition that plaintiff should not accept a judgment for a reduced amount. The erroneous allowance on account of interest was ascertainable, and the court might eliminate the amount of such erroneous allowance and render final judgment for the balance.

Thus it appears that the only grievance of the appellant is in this respect that a judgment had already been entered on the verdict which remained a valid and binding adjudication notwithstanding the attempt to enter a subsequent correct judgment. Construing together the original judgment, the written finding of the judge in ruling on the motion for a new trial, and the final judgment entry, it is plain that the effect of the action of the court was to

set aside the first judgment, and to enter a new and correct judgment in its place as of the same date. It could hardly be contended that, if the ruling on the motion for a new trial had expressly recited the setting aside and vacation of the first judgment, the second and correct judgment would not have been effectual. The intention of the trial judge in his ruling to set aside and cancel the judgment already entered is perfectly clear; and it is perfectly clear that the second and correct judgment is a substitute for the judgment first entered.

We reach the conclusion that the final judgment is for a correct amount, and such judgment is therefore,—*Affirmed.*

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R. G. REINIGER, Appellee, v. BOARD OF REVIEW OF THE  
CITY OF CHARLES CITY, Appellant.

**Taxation: ASSESSMENT OF PROPERTY: EQUALITY.** An assessment of property must be fair and equitable, as compared with the valuation and assessment of other like property in the same jurisdiction, so that no particular piece of property will be made to bear an unjust proportion of the public burden. This rule is not modified by chapter 60 of the Acts of the Thirty-Second General Assembly relating to appeals.

*Appeal from Floyd District Court.*—HON. C. H. KELLY,  
Judge.

FRIDAY, NOVEMBER 15, 1912.

APPEAL from a judgment of the district court reducing an assessment upon certain real estate in the city of Charles City owned by plaintiff from \$5,000 to \$4,200.—*Affirmed.*

*J. C. Campbell*, for appellant.

*J. H. Lloyd*, for appellee.

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DEEMER, J.—The city assessor valued plaintiff's real estate for assessment at \$3,200, and the board of review upon due notice raised the assessment from \$3,200 to \$5,000. Plaintiff appealed to the district court and upon a hearing there the assessment was reduced to the sum of \$4,200, and the board of review appeals. The property consists of two lots in what is known as block 47 in Kelly & Co.'s addition. These lots are near the business section of the city, and near the site selected for the United States postoffice. Immediately south of the lots is a lumber yard, and upon the southwest corner of the block is a church. Across the street to the east is a brick store building. The witnesses introduced at the trial showed the property to be worth from \$7,000 to \$8,000, but their testimony was directed to other adjoining and adjacent property, showing that all of it was much undervalued both by the assessor and the board of review. It is claimed that the judgment rendered by the court placed a fair and equitable valuation upon the property considered with reference to other property in the vicinity, and this, we think, is true. But appellant contends that each assessment should stand upon its own bottom, and that the valuation fixed by the board should have been approved and confirmed by the district court. This is not the rule, unless it be true, as appellant contends, that chapter 60, Acts 32d General Assembly makes it so. Under holdings prior to the adoption of that statute all assessments must be equitable and fair, and no piece of property made to bear an unfair or inequitable proportion of the public burdens. *Barz v. Board of Equalization*, 133 Iowa, 563, and cases cited. Acts 32d General Assembly (chapter 60), hitherto referred to, did nothing more than authorize an appeal by any officer or interested municipality or by a taxpayer. It reads as follows:

Any officer of a county, city, town, township or school district interested or a taxpayer thereof may in like manner make complaint before said board of review in respect



to the assessment of any property in the township, city or town, and an appeal from the action of the board of review in fixing the amount of assessment on any property concerning which such complaint is made, may be taken by any of such aforementioned officers. Such appeal is in addition to the appeal allowed to the person whose property is assessed and shall be taken in the name of the county, city, town, township or school district interested and tried in the same manner, except that the notice of appeal shall also be served upon the owner of the property concerning which the complaint is made and affected thereby or person required to return said property for assessment. Upon trial of any appeal from the action of the board of review fixing the amount of assessment upon any property concerning which complaint is made, the court may increase, decrease or affirm the amount of the assessment appealed from.

Surely it was not the intent of the Legislature in adopting this statute to change the general rule that all assessments must be as nearly equal as the facts will justify; and equitable among the several property owners.

The trial court found that to make this equality the assessment of plaintiff's property should be reduced to the sum of \$4,200. With this conclusion we are inclined to agree. But, if we were not entirely satisfied, the finding of the court has such support that we should not interfere.

The judgment must be, and it is,—*Affirmed.*

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ANN E. PARMENTER, Appellant, v. SABERT E. PARMENTER, MRS. SABERT E. PARMENTER, his wife, WALTER E. PARMENTER, and EDITH WITMER, formerly PARMENTER.

**Fraudulent conveyances: EVIDENCE.** In this action to set aside a conveyance from plaintiff to her son, the evidence is reviewed and held insufficient to show that the conveyance was procured through the fraud and collusion of defendants.

**Accounting: RENTS AND PROFITS: PERSONAL SERVICES.** Where defendant took possession of his mother's farm under an express agreement that he was to have what he could make from it, and in return take care of her, pay taxes and insurance and make improvements and repairs, all of which he did, she was not entitled to an accounting for rents and profits during the existence of the arrangement; nor to compensation for her services while they thus lived together.

**Trusts: EVIDENCE: LIMITATIONS.** Where the evidence disclosed that a son was to use and handle personal property of his deceased father as his own, with no requirement for an accounting to anyone, finally using and disposing of it all, and his mother made no claim to any interest therein for more than ten years thereafter, no trust in favor of the mother was established: and if a trust existed action therefor was barred.

*Appeal from Polk District Court.*—HON. LAWRENCE DE GRAFF, Judge.

FRIDAY, NOVEMBER 15, 1912.

The facts are stated in the opinion.—*Affirmed.*

*L. A. Smyres and Dale & Harvison*, for appellant.

*Parker & Riley*, and *Bowen & Alberson*, for appellees.

SHERWIN, J.—The plaintiff is the widow of Edward Parmenter, who died intestate in Polk county in 1897, leaving surviving him seven children. The defendant Sabert E. Parmenter is the oldest son, and Walter E. Parmenter the youngest. Edith Witmer is the youngest daughter. Walter and Edith were living at the parental home when their father died, and were of the respective ages of twenty-two and eighteen years. The action was brought against Sabert E. Parmenter to set aside and cancel a certain deed, dated and recorded May 25, 1906, whereby the plaintiff conveyed to him ninety acres of land situated in Polk county, on the ground that the same was made without consideration,

without independent advice, and because of fraud and collusion practiced upon the plaintiff by her two sons, Sabert and Walter. As incident to the main relief sought, plaintiff seeks an accounting against Sabert for the rents and profits of said land for the years 1901 to 1910, both inclusive. She also asks to recover against Sabert for labor and services rendered him during the same period. The plaintiff seeks to recover against Walter E. Parmenter for the wrongful conversion to his own use of the plaintiff's share of the personal property belonging to his father's estate, and for the rents and profits of the same land for the years 1898, 1899 and 1900. Sabert E. Parmenter denied the grounds upon which his mother asks the cancellation of said deed, and, further answering, he alleges that he has made improvements on said land, relying upon said deed, and his mother is thereby estopped to maintain this action. As to the claim for an accounting for the rents and profits of said land, he says that action for the same for the years 1901 to 1905 is barred by the statute of limitations. As to the period from 1906 to 1910, both inclusive, he pleads that he occupied said premises with his mother, under verbal agreement with her made prior to the beginning of such occupancy, whereby he was to have the rents and profits of the land in return for the payment of taxes, insurance, repairs, and upkeep of the same, and the personal expenses of his mother, and avers compliance therewith on his part. He denies her claim for services. Walter E. Parmenter, for answer to the claim against him, denied generally, and further pleaded that the action was barred by the statute. He further pleads the same arrangement with his mother for the use of the land that is pleaded by his brother Sabert, and alleges compliance therewith. The district court refused to cancel the deed, and found against the plaintiff's claim for services. As to an accounting for rents and profits by Sabert, the court found the same barred for the years 1901 to 1905. An accounting for the years 1906

to 1910 was granted, and it was found that Sabert was indebted to his mother in the sum of \$300. The court found adversely to the plaintiff on her claim against Walter E. Parmenter. The plaintiff alone appeals.

A statement of the conditions existing at the time of the death of the husband and father, and of the subsequent financial transactions between the mother and the two sons, Sabert and Walter, and the daughter Edith, prior to the execution of the deed in question, will throw much light on the present controversy. As we have heretofore said, Edward Parmenter, the father, left surviving him his widow, the plaintiff, and seven children. Prior to his death, the five oldest children, including the defendant Sabert, had received advancements of their share of the father's estate. This is conceded by all parties, and at the time of his death Mr. Parmenter owned two hundred and seventy acres of land in Polk county and certain personal property, and the son Sabert was appointed administrator of his estate. Very soon after the death of the father the family had a conference at which it was mutually agreed that the oldest five children had already received more than their proportionate share of their father's property, and that the estate left at the time of his death should be divided equally between plaintiff, Walter and Edith. It was thereupon divided so that each of the three received what was considered to be one-third in value of the entire estate left by the father; conveyances were duly executed, whereby Edith took title to one hundred acres of the land, Walter received eighty acres thereof, and the plaintiff the remaining one-third, being the ninety acres in controversy, upon which the homestead was located. Walter and Edith continued to live with their mother in the old homestead until late in 1900, under conditions which will be more fully disclosed further along. Some two months after this division had been made, the plaintiff made a will, by the terms of which Edith and Walter were to receive the ninety acres in con-

troversy upon the death of plaintiff. In November, 1897, a public sale was had of a part of the personal property belonging to the estate, and from the proceeds of such sale Edith was paid \$1,000 in full settlement of her interest therein. The remainder of the money received from the sale of such property was kept and used by Walter as if the entire amount thereof belonged to him, and this was without any objection from the plaintiff. The remainder of the personal property was kept on the farm and was sold, or otherwise disposed of, by Walter, without objection on the part of the plaintiff. Walter remained with his mother, and worked the farm until in November, 1900, when he was married and left. Edith remained with her mother until in December of the same year, when she also married and left the old home. A few months before these marriages, and in anticipation thereof, as the record fairly shows, Sabert arranged to go back to the old homestead and take care of his mother. Sabert had before this time, separated from his wife, and was then living some distance from his mother. He owned one hundred and sixty acres of land, which about August, 1900, he traded to Walter for the eighty acres that Walter had received in the division of the two hundred and seventy acres left by the father, and for Walter's interest under the will of his mother in the ninety acres in controversy. Sabert also purchased from Edith the one hundred acres that had been deeded to her in the family settlement, and also bought from her and paid her \$1,000 for her interest, under her mother's will, in the ninety acres in controversy. These transactions were fully understood and acquiesced in by the plaintiff, except that she thought, and so expressed herself, that Sabert was not making an advantageous trade with Walter. Shortly after Sabert had purchased the respective interests, under the plaintiff's will, of Edith and Walter in the land in controversy, and to carry out the new arrangement, the plaintiff agreed to and did make

a new will in which she devised the ninety acres in controversy to Sabert. Near the close of 1900 Sabert went back to the old home and to his mother, where they lived together until the fall of 1910. Plaintiff was not satisfied that the will in favor of Sabert would accomplish her intention to give him the land in controversy, and, after several talks about the matter, she executed the deed of May 25, 1906, which gave Sabert the title in fee to the ninety acres in controversy, subject to a life estate reserved to herself. Both before and after the execution of this deed, Sabert farmed the ninety acres, and took all of the proceeds therefrom, using the same for the support of himself and mother, for taxes and improvements on the land, and for purposes of his own. During the years that Sabert and the plaintiff thus lived together, the plaintiff, though well along in years, was able to do, and did, a great deal of the hard work. The mutual love of these two was great, and each was deeply concerned for the welfare of the other, but in the fall of 1910 differences between them, arising in part, at least, out of Sabert's second marriage, caused the plaintiff to leave him, and she thereupon went to the home of her daughter Edith.

I. Appellant contends that because of the confidential relation existing between the defendant Sabert E. Parmenter, and his mother, the plaintiff, and because of

her trust and confidence in him, as shown  
1. FRAUDULENT  
CONVEYANCES:  
evidence. by the record, the burden of proof is upon him to show the *bona fides* of the transaction.

We have held in many cases that where there is such fiduciary relation between parent and child, and the conveyance is gratuitous, the burden rests upon the beneficiary to prove the *bona fides* of the transaction. And without determining whether the record before us shows that such relation existed here, or that such trust and confidence was reposed in the son as to invoke the application of the rule, we may concede that it should be applied to the

transactions under consideration. But, giving the plaintiff the full benefit of such rule, we are still of the opinion that she is not entitled to have the conveyance set aside and canceled. The undisputed history of the transactions between the plaintiff and these defendant sons and daughter from the time of the death of the father until the unfortunate separation of the mother and Sabert in the fall of 1910 in itself almost conclusively refutes the present claim of the plaintiff. The five oldest children had received, at least, all that they were entitled to from their parents before the death of Mr. Parmenter, and after his death, Edith and Walter were the only children about whose financial welfare the mother was concerned. The other children were married and had homes of their own, and it was upon Edith and Walter, one or both, that the mother must depend, if she continued to live in the home that had been hers and her husband's for over forty years. That she did not then or thereafter want to break up her home is conclusively shown. Edith and Walter were both young and as the plaintiff thought would both remain with her for many years. But the plaintiff thought that, in any event, these two were justly entitled to the ninety acres when she was through with it, and hence she made her first will giving it to them. This arrangement continued with the approval of all, until Edith and Walter were planning their marriages and the consequent departure from the parental roof, and it became apparent that other arrangements would have to be made for the care of the mother. Sabert had always been, and was then, plaintiff's favorite son. He and his wife were separated, and there was no obstacle in the way of his going to his mother's home and helping her keep it for the rest of her life. To enable him to do this, he acquired by purchase the tracts of one hundred acres and eighty acres that Edith and Walter had received in the division of the home farm, and also purchased of them the interest which they were supposed

to have in the land in controversy under the will of the plaintiff, and there can be no question but what this arrangement was made with the full knowledge and approval of the plaintiff. After Sabert had bought and paid for this expectancy of Edith and Walter, under the circumstances disclosed, about the only natural and right thing for the plaintiff to do was to make some arrangement that would protect him, and, following out the plan that she had adopted with Edith and Walter, she made a new will, devising the land to Sabert. Up to this point of time there could have been no fraud or collusion practiced upon the plaintiff without a participation therein by the daughter Edith, and this the plaintiff does not claim. The subsequent execution of the deed to Sabert simply made a present conveyance of an interest that the grantor originally intended should be postponed until her death. All of these transactions appear to us to have been very natural and proper, and we are united in the view that there was no fraud, collusion, or conspiracy connected with any of them.

II. Appellant can not justly complain because she was not allowed a greater sum on the accounting between her and Sabert. The decided preponderance of the evidence shows that Sabert took possession of the farm, and continued such possession under an express agreement with the plaintiff that he was to have what he could make from it in return for taking care of plaintiff, paying the taxes and insurance, and for improvements and repairs, all of which he did. This agreement remained in force during all of the years involved in this controversy, and plaintiff was not in reality entitled to the sum found due her on the accounting, but, as the defendant Sabert does not appeal, we need not further discuss the matter.

III. Appellant does not press her appeal on the proposition that she should have been given recovery for her services while she and Sabert lived together. That she is



clearly not entitled to anything on that account, see the following decisions: *In re Estate of Bishop*, 130 Iowa, 252; *Donovan v. Driscoll*, 116 Iowa, 339.

IV. It is appellant's contention that Walter E. Parmenter wrongfully converted her share of the personal property that was left by her husband, and that he thereby became a trustee, holding it for her benefit.

3. TRUSTS:  
evidence:  
limitations.

It is sufficient answer to this claim to say that the evidence wholly fails to prove a trusteeship. On the other hand, it is shown without serious question that Walter was to use and handle this property as his own, and that he was not to account to the plaintiff for it. Moreover, at the time he left the farm in 1900, the said personal property had all been either used or disposed of by him, and no claim was made therefor until this suit was brought more than ten years thereafter. Had any of this property ever been held in trust for the plaintiff, her action therefor would now be barred, because of Walter's denial of the trust and claim to the property before and at the time he left the farm. *Wilson v. Green*, 49 Iowa, 251; *Murphy v. Murphy*, 80 Iowa, 740; *Peters v. Jones*, 35 Iowa, 512.

V. Walter's possession of the land in controversy from 1897 to 1900, and his use of the income therefrom, was under an agreement with his mother that he was to take care of her and pay other expenses connected with the land, and have what he could make over and above that amount. The judgment of the district court is, in all respects,—*Affirmed.*

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CANTRIL TELEPHONE COMPANY, et al., Appellees, v. BENJAMIN T. FISHER and EMERY STRUBLE, Appellants.

**Telephone associations: MEMBERSHIP: TRANSFER OF SAME.** In this action by a mutual telephone company to enjoin defendants from connecting with or using its lines, it appears that the articles of

the telephone association provide for a membership fee which entitled the member to one phone, and that they prohibit the sale of the membership right without first offering it to the association, except that a purchaser of the farm may have the first right to purchase the seller's telephone rights. *Held*, that a warranty deed of the farm, with all appurtenances thereto belonging, did not operate to pass the vendor's membership in the association to the purchaser, and that the association is entitled to enjoin the purchaser from connecting with and using the line.

*Appeal from Van Buren District Court.*—HON. FRANK W. EICHELBERGER, Judge.

FRIDAY, NOVEMBER 15, 1912.

Suit in equity to enjoin the defendants from connecting with and using the telephone line of plaintiffs, appellees. A temporary writ was issued and served. The defendants filed an answer and cross-bill. They also prayed in their cross-bill for an injunction to enjoin the plaintiff from disconnecting them with the telephone line. Later the defendants filed a motion to dissolve the temporary writ of injunction issued upon the prayer of the plaintiffs, and a further motion asking for the issuance of a writ of temporary injunction in their own behalf. These motions came on for hearing in vacation. Both motions were denied, and the defendants appeal from such order.—*Affirmed*.

*Joseph C. Mitchell, and Robert & H. B. Sloan, for appellants.*

*Walker & McBeth, for appellees.*

EVANS, J.—We avail ourselves of the following statement of the case contained in appellant's brief:

The plaintiff, the appellee, Cantril Telephone Company, is an unincorporated and acting association, claiming to be organized and acting under written articles of asso-

ciation, inaccurately called 'by-laws.' Those articles, signed by sixteen persons, are not only crude and inartistic, but in and of themselves alone fail to show the real purposes and objects of the organization, and are especially silent as to the means and procedure by which the objects and purposes, whatever they may be, are to be effected. But, when the articles are supplemented by the acts and operations under them by the association, it quite fairly appears that the objects and purposes of the association are not pecuniary profit, but the supplying of telephone conveniences in the homes of members of the association at a price not exceeding actual cost. The terms 'stock of said company,' 'stock,' 'stockholders,' and 'share of stock' are frequently used in the articles, but evidently inaccurately. Manifestly, by the term 'stockholders,' is meant the members of the association, and by the term 'stock,' the privileges appertaining to membership. One becoming a member had to pay \$12 (afterwards seemingly raised to \$40), which should properly be styled a membership fee, and the money so raised was doubtless used in constructing the line, and any surplus applied on operating and other incidental expenses. A member had the right to connect one phone with the association's wires, and thus have the use of the association's lines and connections for such use, having from time to time to pay such assessments as the association should make to meet the expenses of maintenance and operation.

The articles contain these provisions:

'Art. 2. The number of shares shall be limited to the number of phones said line will carry and do good service.

'Art. 3. Each stockholder shall have the right to put in but one "phone and shall have the use of said line for such phone under such regulations as may be adopted by the board of managers.' (Abs. 19, line 25.)

'Art. 14. No member shall be allowed to own more than one share of stock nor shall he be allowed to sell his share of stock until after he has offered it for sale to the company (except in case such stockholder should sell his farm, in which case the purchaser of the farm shall have the first chance to purchase such stock), at a price not to exceed the original cost of the share. Any share of stock so purchased by the company shall be held as common stock of the company, but can be sold or rented by the company

to any person who is not a stockholder at the time of purchase.'

In the case at bar, at the time the line in question was constructed, one H. H. Barnett owned the W.  $\frac{1}{2}$  of N. E.  $\frac{1}{4}$ , section 7, township 67, range 10, in Van Buren county, and said line was constructed along the south end and east side of said land; and he, being a member of the association, by virtue of such membership, connected a phone in the dwelling house on said lands with said line, and while he owned said lands continued to use said phone and line. On October 28, 1909, said Barnett entered into a written agreement with the defendant B. T. Fisher, whereby he sold said lands, 'together with all appurtenances thereto belonging' to the defendant, and pursuant to said contract on November 5, 1909, deeded, by warranty deed and without any reservations, said lands to defendant Fisher, who under said deed went into possession and has ever since been in possession by a tenant.

We are asked by the appellants not to prejudge the final merits of the case on the ground that the record is not sufficient for such purpose. It is the contention of the defendants that the plaintiff company knowingly bought a lawsuit, and that it undertook to make itself the judge of a controversy between Fisher and Burnett. The following excerpt from appellants' brief concisely presents their point of view:

It, or its smart Alocs, thought the company could, by use of a pressure that Barnett could not bring to bear, bring Fisher to an unconditional surrender—that is, Barnett could not disconnect the phone, the company could, and doubtless as the smart Alocs thought, Fisher would surrender before suffering disconnection. But they didn't know Ben Fisher. We now broadly assert that the granting of and the refusal to dissolve the injunction issued on the part of the plaintiff was an abuse of injunctive procedure, regardless of whether Fisher's good faith claim of ownership may or may not be finally determined in his favor. And it was, we assert, an abusive refusal to exercise a wholesome power, when the court refused to grant the temporary injunction prayed for by Fisher and Struble.

Fisher and Struble have an unqualified right to a full final hearing without being forced to a choice of either renouncing their claimed right or of suffering irreparable injury. The company can not be allowed to become the judge between Fisher and Barnett, and then decide in Barnett's favor, put itself in Barnett's place, and by kind of duress force Fisher to yield—enforce against Fisher a pressure Barnett could not enforce.

Careful examination of the record satisfies us that the defendants' view of the case as thus expressed is somewhat distorted. Burnett was a member of the plaintiff company. He sold his farm to the defendant Fisher, and executed a warranty deed therefor in the latter part of November, 1909. The theory of appellants is that the warranty deed as a matter of law carried to the grantee the membership in the plaintiff company as an appurtenance to the land. This claim is based to some extent, also, upon the provisions of section 14 of the articles of the company. It is clear that, in the absence of section 14 of the articles, the mere conveyance of the land by warranty deed could not of itself confer membership upon the grantee in the plaintiff company. It is conceded by appellees that the sale of the land to Fisher carried to him a right or option to purchase the "share" of Burnett, and to become a member of the plaintiff company. The trial judge was justified in finding from the affidavits before him that in the negotiations for the sale of the land Burnett had solicited Fisher to buy his "share" in the plaintiff company, and that Fisher declined to do so. For the first year after the purchase, Fisher's tenant paid to Burnett the rental provided for in section 14. In the spring of 1910 the company refused to buy from Burnett because it desired that Fisher should buy the same and become a member. One year later it bought the share from Burnett under the provisions of section 14 for \$24. It knew at this time that Fisher claimed that his warranty deed carried all of Burnett's rights to member-

ship in the plaintiff company, and that he refused to purchase it in any other way, and refused to pay rent therefor. The plaintiff company has always been ready and willing to admit Fisher to membership upon payment for the "share," and otherwise willing also to permit him and his tenant, Struble, to use the phone upon payment of the usual rent. The defendants refuse to do either. The sum of \$24 therefore measures the full substance of this controversy. If the plaintiff company made itself a judge of the controversy between Burnett and Fisher, it did no more than the defendants forced it to do in protection of its own rights. Under the provisions of section 14, an option was reserved to the company to purchase such share. A failure to exercise such option would amount, under such section, to an implied permission to Burnett to sell to whomsoever he could. The company had a right under such section to refuse such permission by exercising such option itself, and there is nothing in the record to impeach its good faith in such course. Such course on the part of the company did not settle or prejudice any controversy as between Burnett and Fisher. The plaintiff company was justified in refusing to become involved in such controversy, and to require the parties to it to settle it between themselves. If Fisher's contention is sound that he purchased the share from Burnett by force of his warranty deed, he had an abundant remedy as for breach of warranty after the sale by Burnett to the company and he could have safely paid the company the \$24 which it paid Burnett in exercising its option. By this manner he could have saved himself the complaint that the company made itself a judge of the controversy. On the other hand, if the company had assumed to accept his contention and to receive him into membership on the strength thereof, it could not escape a part in the controversy. In such case it must apparently decide to whom the share belonged. The company did not arbitrarily refuse membership to Fisher. It

recognized his right under section 14 to purchase Burnett's share. But it insisted upon an uncontroverted purchase, and not a controverted one, before accepting Fisher into membership in lieu of Burnett. It was a *bona fide* and reasonable exercise of its power over its own membership. Presumptively it could not accept Fisher into membership in lieu of Burnett without Burnett's consent. It never had Burnett's consent. Section 8 of the articles provides for a record of stockholders, and that no stockholder shall be released from the liabilities of the company "until the change be indorsed on the records by the secretary." Whatever rights Fisher may have acquired under his warranty deed, it is clear that he did not thereby become a *de facto* member of this association. Further action was necessary on his part for that purpose. He could not be deemed a member against his will by mere force of his warranty deed. And in like manner some action was necessary on the part of the plaintiff company indicating its assent to the change of membership. We had occasion to consider this question to some extent in *Staples v. Hobbs*, 145 Iowa, 114. We there held that the alleged purchaser had not established his membership in the company. Applying to the case before us our holding in the *Staples* case, it is quite clear that Fisher has never become a member of the plaintiff company. His right to connect with the telephone line is dependent upon his membership. The plaintiff company has been guilty of no arbitrary act or bad faith to prevent his acquiring membership in a proper way. The only relief he prays for in his cross-bill is that the plaintiff company be enjoined from interfering in any way with his connections with the telephone line. Upon the record before us, he is not entitled to such relief and the trial judge properly so found.

II. It is strongly urged that the granting of a temporary writ of injunction was an abuse of power, regardless of the final merits of the case, and that such writ should

be dissolved. It will be noted that both parties prayed for such writ. From a bird's-eye view of the case it is quite apparent that one party or the other was entitled to the writ. If the defendants were entitled to it, the plaintiffs were not. And, if the defendants were not entitled to it, there can not be much substance to the claim that plaintiffs were not. The plaintiffs brought their suit in equity for an injunction as an independent remedy under the provisions of Code, section 4354. They prayed a temporary writ, and this was issued under the provisions of sections 4355 and 4356. Our discussion in the preceding paragraph is a sufficient statement of the record to show that the trial judge was justified in granting the temporary writ of injunction. On this question we need add nothing to what has been said in our previous cases. *Ladd v. Osborne*, 79 Iowa, 93; *Tantlinger v. Sullivan*, 80 Iowa, 218; *Price v. Baldauf*, 82 Iowa, 677; *Troe v. Larson*, 84 Iowa, 652; *Halpin v. McCune*, 107 Iowa, 494; *Keil v. Wright*, 135 Iowa, 383.

No other question is presented for our consideration. The order of the trial court is therefore,—*Affirmed*.

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J. L. FORD, JOHN KING, BEN VAN LANGDEN, as Trustees of Liberty Township, Hamilton County, Iowa, and BEN WELP as Highway Supervisor or Road Superintendent of Liberty Township, Hamilton County, Iowa, and of District No. 4 in said Township, v. F. D. DOOLITTLE, R. L. DOOLITTLE and J. F. SCHWANDT, Appellants.

**Highways: REMOVAL OF OBSTRUCTIONS: PARTIES.** A township road supervisor has authority to maintain an action to remove an obstruction from a highway, and where he joins with the township trustees as plaintiff, the right of the trustees to maintain the action is immaterial.



**Same: ADVERSE POSSESSION: ESTOPPEL: EVIDENCE.** Title to a highway  
2 can not be acquired by adverse possession, although inclosed by fences and occupied by adjoining owners for more than ten years; but a highway may be so occupied that the public will be estopped from claiming it. In the instant case the evidence is held insufficient to estop the public from claiming the highway.

**Same: REMOVAL OF OBSTRUCTIONS: INJUNCTION.** Where a landowner  
3 assisted in erecting an obstruction in the highway, and a codefendant asserted that it would have been replaced if removed by the road supervisor, they were properly enjoined from interfering with the highway upon removal of the obstruction by the supervisor.

*Appeal from Hamilton District Court.*—HON. CHAS. E. ALBROOK, Judge.

FRIDAY, NOVEMBER 15, 1912.

ACTION to require defendants to remove an obstruction from the highway resulted in a decree as prayed. Defendants appeal.—*Affirmed.*

*D. C. Chase, and Wm. Whisler, for appellants.*

*Wesley Martin, for appellees.*

LADD, J.—The plaintiffs, Ford, King, and Van Langden, are the trustees of Liberty township, in Hamilton county, and Welp, the highway supervisor or road superintendent in and for said township and in this action, seek to enjoin the defendants from obstructing an alleged public highway between sections 22 and 23 thereof. It appears that F. D. Doolittle owned the N. W.  $\frac{1}{4}$  of section 23 and A. P. Doolittle the S. E.  $\frac{1}{4}$  of the same section. Since the beginning of the action the latter departed this life, and his sole heir, Electa F. Doolittle, was substituted in his stead as party defendant. The defendant Schwandt owned the E.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of section 15, and the E.  $\frac{1}{2}$  N. E.  $\frac{1}{4}$

and a part of the N. E.  $\frac{1}{4}$  S. E.  $\frac{1}{4}$  of section 22 of the same township. The highway record in the county auditor's office indicated that a road had been established along the line between sections 22 and 23 as early as 1880, and had not been vacated. There was a pond or slough near the center north and south, and the road was graded through this in 1884, and again ten years later, and seems to have been traveled until 1896. Fences had been constructed on each side in 1884. In 1897 a fence with a gate in it was erected across the north end of the space set apart for a highway between the sections, and thereafter across the south end, with a gate in it, but later this gate was removed, and two fences constructed near the middle. The strip has been used since for hay or pasturage, though occasionally teams have been driven at least part way through, and then, the fence being torn down, through the adjacent field.

In August, 1909, F. D. Doolittle, with the assistance of R. L. Doolittle and another, set the fence on the east side over to the center of the highway on the section line, and, upon being notified by an officer to discontinue its construction and remove the fence, completed it, and thereafter, on being interviewed by plaintiffs, refused to remove it, though expressing a willingness to bide any order which might be made by the courts and this is the attitude of Schwandt, there being no doubt that, had the road supervisor removed the fence, these parties would have replaced it. Nothing had been done by the public on the road since 1894, and it was included in a drainage district wherein the benefits to three miles of highway were assessed at \$495.70. The evidence tends to show that the water from the pond or slough has been drained by the improvement and the road may now be worked, and also that F. D. Doolittle circulated a petition along in 1895 or 1896 "praying that the road be opened." In this suit plaintiffs ask that defendants be required to remove the fence obstructing the highway, and enjoined from interposing like future

obstructions. Plaintiffs dismissed as to Electa F. Doolittle, and the relief prayed was granted as to the other defendants.

Their first contention is that plaintiffs can not maintain the action. As to Ben Welp, the road superintendent, this court held otherwise in *Myers v. Priest*, 145 Iowa, 81.

1. HIGHWAYS: *See Patterson v. Vail*, 43 Iowa, 142. This  
removal of  
obstructions:  
partica. being so, it is unnecessary to determine  
whether such an action might also be main-  
tained by the other plaintiffs.

Even though the highway may have been inclosed by the cross-fences and occupied by the abutting owners more than ten years, title was not acquired thereto  
2. SAME: *Rae v. Miller*, 99 Iowa, 650; *Biglow v. Ritter*, 131 Iowa, 213; *Mc-Elroy v. Hite*, 154 Iowa, 453.  
adverse pos-  
session: estop-  
pel: evidence.

But a highway may be so occupied by the abutting owner that the public will be estopped from claiming it. *Davies v. Huebner*, 45 Iowa, 575; *Orr v. O'Brien*, 77 Iowa, 253; *Smith v. Gorrell*, 81 Iowa, 218; *Rector v. Christy*, 114 Iowa, 475. In the first three of these decisions, the portions of the highway in dispute had never been traveled. In *Rector v. Christy*, the road was changed in location and a portion of the former highway, not in the new location and not in the line of travel, was included in the field of the abutting owner for a period of more than ten years, and the public was held to have abandoned it. In *Heller v. Cahill*, 138 Iowa, 301, and *Lucas v. Payne*, 141 Iowa, 592, also relied on by appellant, the public had never used the road. In the case at bar the highway had been opened, and, though there was a slough or pond near the center north and south, it was graded through this in 1884, again in 1894, and was continuously traveled by the public until 1896. Thereafter travel practically ceased, probably owing to the marsh mentioned, but the fences which had been constructed on each side in 1884 were not disturbed until

1909, when the Doolittles moved that on the east side over to the center of the highway or on the section line, notwithstanding its objections interposed by the trustees and road superintendent. If there be any foundation for the contention that the highway has been abandoned, or that the public is estopped from claiming it as such, this must be owing in the erection of the cross-fences in 1897 and subsequent thereto. F. D. Doolittle built the fence across the north end, but put a gate in it for the convenience of those driving through, and this was maintained by him until 1909. The fence across the south end was erected by the road superintendent also with a gate, and evidently as a warning of trouble ahead, owing to the existence of the marsh. Later this gate was closed, and a couple of cross-fences constructed near the middle of the mile road, but this was much less than ten years previous to bringing the suit. If F. D. Doolittle was claiming the roadway, why did he leave a gate in the cross-fence through which the traveler might conveniently pass? Why were not the side fences removed and the strip of land inclosed with the fields of the respective owners? It continued to be occupied as a separate and distinct parcel of ground, and in a manner to plainly indicate that, if the public had ceased to use it as a highway temporarily, the owners of the fee were merely enjoying its economic use, and not claiming it as their own. Apparently what defendants did prior to 1909 was not intended to be permanent, but merely to enable them to make better use of the highway as a pasture. The erection of the cross-fences under these circumstances can not alone be said to be sufficient to warn the public of an adverse claim, especially as the particular road was but a portion of a highway extending several miles farther to the north and to the south, and therefore there was no sufficient basis for the pleas of abandonment and estoppel.

Counsel argue that the petition should have been dismissed as to Schwandt and R. L. Doolittle. The latter

assisted in the erection of the fence in the center of the highway, and both asserted that, had the road superintendent removed the fence, they would have replaced it; the former saying there would have been a contest.

3. SAME:  
removal of  
obstructions:  
injunction.

This being so, there was ground for enjoining interference on their part. The decree was right, and it is,—*Affirmed.*

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J. A. FITCHPATRICK, Appellant, v. FRANK N. FOWLER,  
County Treasurer of Story County, Iowa, Appellee.

**Drainage: ASSESSMENTS: WAIVER OF OBJECTION: PENALTY: STATUTE.**

A statute authorizing the assessment of private property for a public improvement will be construed most favorably to the property owner, and his burden will not be increased by implications not clearly necessary. Under this rule the statute providing that the owners of land assessed for drainage purposes may waive in writing any objection to the validity of the assessment and thus obtain the right to pay the assessment in installments, with six percent interest per annum, is held to provide a special contract governing the rate of interest after maturity of an installment as well as before, and such waiving owners are not liable for the penalty which the statute provides shall attach to the delinquent assessments of those who do not thus waive objection.

*Appeal from Story District Court.*—HON. C. G. LEE,  
Judge.

SATURDAY, NOVEMBER 16, 1912.

THE opinion states the case.—*Reversed.*

*J. A. Fitchpatrick, pro se.*

*H. E. Hadley, County Attorney, for appellee.*

WEAVER, J.—Drainage district No. 1, in Story county

was duly established, and for the cost of the improvement thus authorized assessment was laid upon the lands included therein. Among the lands upon which the burden was laid were three forty-acre tracts owned by one W. E. Brotheras, which were assessed an aggregate tax of \$3,289, and another forty acres owned by J. F. Ogilvie assessed \$1,019. Availing themselves of the privilege provided by the statute (Code Supp. section 1989-a26), these owners filed a waiver of all objections to the validity of the tax, and thereby became entitled to have the same made payable in ten equal annual installments, with interest at 6 percent per annum. The body of the written waiver and agreement as executed by the landowners is in form as follows: "Nevada, Iowa, October 5, 1907. In consideration of having the right to pay the assessment mentioned in the within certificate in installments as provided by law, I do hereby agree that I will not make any objection of illegality or irregularity as to said assessment, and that I will pay the same with interest thereon at the rate of 6 percent per annum from date of said assessment." Thereafter said owners neglected and failed to pay certain installments falling due, and abandoned the said lands, whereupon the plaintiff, who held mortgage liens thereon, foreclosed the same, and acquired the title. Plaintiff then applied to the county treasurer, and offered to pay all the delinquent installments, tendering and offering to the treasurer the principal sum of each of said installments, with interest thereon at 6 percent from the date of the certificates. The tender so made amounted to the aggregate sum of \$2,154 principal and \$993.49 interest. The treasurer refused the tender, claiming that, under the statute, a penalty of 1 percent per month had accrued upon all the installments as well as upon the unpaid interest from the date when they became delinquent. Plaintiff, declining to comply with said demand, brought this action, alleging the facts above set forth, asking a peremptory order or writ of mandamus requiring the

treasurer to accept payment of said assessments on the basis of said tender, and, upon receiving said sum or sums, to make and deliver to the plaintiff suitable receipts therefor. To this petition the defendant demurred generally. The demurrer was sustained, and, plaintiff electing to stand upon the petition, judgment was entered against him for costs. From such ruling and judgment he appeals.

As the rights of the parties and the determination of the appeal depend entirely upon the construction to be given the section of the statute above cited, we here set it out in full:

Section 1989-a26. How paid—improvement certificates. The special assessment for benefits made by the commissioners appointed for that purpose, as corrected and approved by the board of supervisors, shall be levied at one time by the board against the property so benefited, and when levied and certified shall be payable at the office of the county treasurer. If the owner of any parcel of land, lot or premises against which any such levy shall have been made and certified, which is embraced in any certificate provided for in this section, shall within thirty days from the date of such assessment promise and agree in writing indorsed upon such certificate, or in a separate agreement, that in consideration of having the right to pay his assessment in installments, he will not make any objection of illegality or irregularity as to the assessment of benefits, or levy of such tax upon and against his property, but will pay said assessment with interest thereon at such rate not exceeding six per centum per annum as shall be prescribed by resolution of the board, such tax so levied against the land, lot or premises of such owner shall be payable in ten equal installments, the first of which with interest on the whole assessment shall mature and be payable on the date of such assessment, and the others with interest on the whole amount unpaid annually thereafter at the same time and in the same manner as the March semi-annual payment of ordinary taxes; but where no such terms and agreement in writing shall be made by the owner of any land, lot or premises then the whole of said special assessment, so levied upon and against the property of such owner, shall mature at one time and be due

and payable with interest from the date of such assessment, and shall be collected at the next succeeding March semi-annual payment of ordinary taxes. *All of such tax with interest shall become delinquent on the first day of March next after its maturity and shall bear the same interest with the same penalties as ordinary taxes.* And the board may provide by resolutions for the issuance of improvement certificates, payable to bearer, or to the contractors who have constructed the said improvement or completed part thereof within the meaning of this act in payment or part payment therefor, each of which certificates shall state the amount of one or more assessments or part thereof made against the property designating it and the owners thereof liable to assessments for the cost of the same, and said certificate may be negotiated. Such certificates shall transfer to the bearer, contractor or assigns all right and interest in and to the tax in every such assessment, or part thereof, described therein and shall authorize such bearer, contractor or assignee to collect and receive every assessment embraced in said certificate, by or through any of the methods provided by law for their collection, as the same mature. Such certificates shall bear interest not to exceed six percent per annum, payable annually, and shall be paid by the taxpayer to the county treasurer who shall receipt for the same and cause the amount paid to be applied to the payment of the certificate issued therefor. Provided, that any person shall have the right to pay the full amount of the tax so levied against his property, together with interest thereon to date of payment at any time he desires so to do even before the maturity of any certificates issued therefor. No certificate shall be issued or negotiated for the use of the drainage district for less than par value with accrued interest up to the delivery or transfer thereof. Should the costs of such work exceed the amount of benefits assessed and certificates issued, a new apportionment and levy of tax may be made and other certificates issued in like manner.

Abbreviating as much as is practicable without obscuring the meaning of the text, so far as it is immediately involved in this litigation, the provision is that, if the property owner shall "promise and agree in writing" that he will waive all objections pertaining to the regularity and



legal validity of the assessment upon his land "*and will pay said assessment with interest thereon at a rate not exceeding six percent per annum,*" the tax shall be made payable in ten annual installments, "but where no such terms and agreement in writing shall be made by the owner of any land" then the whole of said special assessment shall mature at one time and be due and payable, with interest from the date of such assessment, and be collected at the "next succeeding March semi-annual payment of ordinary taxes." Thus far, there is no apparent difficulty of construction. The trouble, if any there be, comes in the application of the clause which immediately succeeds the one last quoted, and reads as follows: "All of *such* tax with interest shall become delinquent on the first day of March after its maturity and shall bear the same interest with the same penalties as ordinary taxes." Stated briefly, the simple question is whether the words "such tax" are to be construed as including or applying to the entire assessment of the district lands without regard to the fact whether the taxpayer has or has not entered into the agreement aforesaid or is to be treated as applying solely to those cases in which no agreement is made and the entire tax becomes immediately due and payable.

The appellee contends for the construction first mentioned, and such is the view adopted by the trial court. The statute is not a model of clearness, but its general scope and purpose are not difficult of apprehension. One of its evident purposes is to foreclose, if possible, all question of the validity of the drainage proceedings, and thereby avoid litigation, and give assured value to the certificates or bonds issued in payment for the improvement. To insure this an offer is made of what we may call a premium for voluntary waivers to all legal objections to the assessment. The scheme by which this is to be accomplished contemplates in each instance that the property owner shall enter into a written contract, whereby, in consideration of time for pay-

ment of the tax, all of which would otherwise become due and payable at once, he waives all objection to the legal sufficiency of the assessment, and promises to pay the same in ten equal annual installments, with interest at an agreed rate not exceeding six percent. In other words, what was before a mere special assessment upon the property is converted into a binding promissory obligation to pay with a specified rate of interest; the payment being secured, of course, by the lien prescribed by the statute. It would further seem that, in order to stimulate these settlements, the statute proceeds to declare that, when the property owner fails to enter into such an agreement, "then the whole of said special assessment so levied upon the property of *such* owner shall mature at one time and be due and payable with interest from the date of *such* assessment and shall be collected at the next succeeding March semi-annual payment of ordinary taxes. All of *such* tax shall become due and delinquent on the first day of March next after its maturity and shall bear the same interest with the same penalties as ordinary taxes."

In our judgment "such tax" very clearly refers to the tax or assessment which has just been mentioned in the last preceding sentence or clause, and that is the assessment or tax "where no such terms and agreement in writing shall be made." This conclusion is emphasized and strengthened by the further provision in the same section that "such certificates shall bear interest not to exceed six percent per annum payable annually and shall be paid by the taxpayer to the county treasurer who shall receipt for the same and shall cause the amount paid to be applied to the payment of the certificate issued therefor." In other words, we construe the language in question not as providing a penalty which shall apply alike to all cases without regard to the written waiver and agreement, but rather as a provision *in terrorem*, under the influence of which the largest possible number of settlements and waivers may be obtained—

the penalty to be exacted from those only who do not accept the offer of time. This reading requires no forced or strained construction of the statute. For the purposes of collecting such special assessments, they are by this enactment separated into two classes. One class embraces all assessments where the owners have entered into the prescribed contract, and the other class includes all where no such contract is made. Speaking of the first class, it is provided that *such* tax so levied shall be payable in ten annual installments, with interest not to exceed 6 percent. Here "such tax" is very clearly limited in its application to assessments of the first class mentioned. It is then provided, as we have already noted, that, when no contract is made, the whole of "*said* special assessment" upon the property of *such* owner shall be due and payable, with interest, and be collected with the next semi-annual collection of ordinary taxes. "All of *such* tax with interest shall become delinquent on the first day of March next after its maturity and shall bear the same interest and penalties as ordinary taxes." Here "such tax" just as clearly refers to assessments of the second class as the like words earlier in the section refer to assessments of the first class. Such is the natural as well as the apparent grammatical connection between the words "such tax" and their antecedent.

Even if the words here used should be thought involved in any ambiguity or doubt, it would be the duty of the court to solve that doubt in favor of the property owner if it can be done without violence to the other provisions of the chapter. The laws by which the cost of public improvements is met by special assessments upon private property supposed to be benefitted are at best drastic in nature and burdensome in operation, and the courts should be slow to increase those burdens by implications which are not clearly necessary. Reading between the lines of this record, we can see an illustration of the harshness of results which are not infrequently suffered by individuals who happen to get in

the way of the march of public improvement. Here were evidently two landowners whose premises were already carrying a heavy load of mortgage indebtedness, and, when to this was added a tax of more than \$25 per acre, they were driven to throw up their hands in despair, and abandon the property to the tax gatherer and the mortgagee. A statute which makes such incidental results possible, however beneficial it may be in its general application, should be given the most favorable construction of which it is reasonably capable to keep its consequential hardships within the narrowest practical limits. *Sargent v. Tuttle*, 67 Conn. 167 (34 Atl. 1028, 31 L. R. A. 822). See, also, *Brick Co. v. Smith*, 108 Iowa, 308. The construction contended for by appellee is not necessary to give effect to the plainly indicated legislative intent, and can not be upheld.

It follows that the judgment below must be reversed, and the cause remanded for further proceedings in harmony with the views here expressed.—*Reversed*.

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BLANCHE SCOTT, Administratrix, Appellee, v. J. O'LEARY,  
Appellant.

**Appeal:** SPECIAL FINDINGS: CONCLUSIVENESS. The appellate court  
1 will not disturb the finding, in answer to a special interrogatory,  
which has support in the evidence.

**Evidence:** MATTERS OF FACT AND NOT OPINION. A witness who was at  
2 the scene of the collision of an automobile with a horse and as-  
sisted in extricating the horse, was competent to state that the  
machine was in gear and that the brakes were not set, over the  
objection that the inquiry called for an opinion and not a fact.

**Same:** NONEXPERT EVIDENCE: MATTERS OF OBSERVATION. A nonexpert  
3 witness is competent to testify to the appearance and actions of  
one who has suffered a personal injury, when confined to his own  
observations.

**Contributory negligence:** EVIDENCE: HABITS. Where there were no  
4 eyewitnesses to an accident, a general habit of the injured party,

relative to his claimed negligence at the time of the injury, may be shown, as bearing on his exercise of care in that respect. Thus where it was claimed that decedent was asleep in his carriage when injured by collision with an automobile, it was competent to show his habit of sleeping when driving.

**Admission of evidence: HARMLESS ERROR.** In this action for injuries  
5 to decedent by collision of his horse and carriage with an automobile, evidence of the admissions of decedent with reference to his conduct with another horse and carriage, more than a year previous, was not reversible error, even if erroneously admitted.

**Evidence: TRANSACTIONS WITH A DECEDENT.** The testimony of the  
6 mother of deceased that she had given him his time, that he worked for himself, collected his own wages, owned property and conducted his own business, was neither objectionable as incompetent, nor as relating to a personal transaction.

**Highways: NEGLIGENT SPEED OF AUTOMOBILE: INSTRUCTIONS.** An in-  
7 struction following the language of the statute, that one operating an automobile at an average speed of more than twenty miles per hour is prima facie guilty of negligence, was not erroneous, although the language may be somewhat obscure.

**Same: OPERATION OF AUTOMOBILES: CARE.** The driver of an automob-  
8 ile is bound to know that people are likely to be traveling the highway at all seasons of the year, and all times of day and night, and he has no right to expect a free and unobstructed driveway.

**Emancipation of minor: EVIDENCE: SUFFICIENCY: WAIVER: INSTRU-**  
9 **TION.** Even if the testimony of a brother of decedent that decedent, a minor, had been living in his family, attending to his own business and drawing his own wages, was not sufficient to show his emancipation, the mother's evidence that he had been emancipated was sufficient, in the absence of an objection on the trial that she was not the proper person to emancipate him; and as such objection was not made prior to submission of the appeal, it was waived, and failure to show that the father was not living was not material.

**Damages: INSTRUCTION: PRESUMPTION.** Where there was no evi-  
10 dence that decedent's harness was injured in a collision of his horse with an automobile, and no evidence of its value, it will be presumed that the jury followed the instruction of the court, directing them to allow damage to the harness only in the event damage was proven; and it will also be presumed that no damage was allowed on that account, but if any damage was allowed on that account it must have been small, and no reversal should be ordered.

*Appeal from Johnson District Court.*—HON. R. P. HOWELL,  
Judge.

SATURDAY, NOVEMBER 16, 1912.

ACTION to recover damages for injuries sustained by plaintiff's intestate, and damages done to his property as a result of an automobile collision. Defendant filed a general denial, and upon the issues joined the cause was tried to a jury, resulting in a verdict for the plaintiff in the sum of \$550, upon which judgment was rendered, and defendant appeals.—*Affirmed.*

*Wade, Dutcher & Davis*, for appellant.

*Edwin B. Wilson and Ranck & Bradley*, for appellee.

DEEMER, J.—This action was brought by Clyde Scott, a minor, during his lifetime, in the name of George Scott, his next friend. During its pendency, but before trial, Clyde Scott died, and plaintiff, Blanche Scott, the administratrix of his estate, was substituted as plaintiff. It is not claimed that Clyde Scott died as a result of his injuries; but it is averred that he suffered personal injuries, was at expense for medical treatment, that he lost time, and that his horse was killed and his buggy and harness injured. In speaking of the plaintiff, we shall, unless otherwise stated, refer to Clyde Scott.

It is averred in the petition that plaintiff, while driving a single horse hitched to a top buggy, along a public highway in Johnson county, Iowa, known as the lower Muscatine road, traveling in a southeasterly direction, met the defendant, who was coming from an opposite direction in a large high-powered automobile at an excessive, unlawful and unreasonable rate of speed, with the lights of his car in an imperfect condition, and that he (defendant) reck-

lessly and carelessly and without looking to see if there was any one in the road, and without using any care or caution, drove his automobile directly into plaintiff's horse and vehicle, killing the horse, injuring the buggy and harness, and throwing him (plaintiff) to the ground, seriously injuring him. He further pleaded that defendant did not turn out or give him any part of the highway, and that he might have avoided plaintiff had he been so minded; but on account of not paying attention to where he was going, the defective condition of his lights, and the high rate of speed, the collision occurred. Plaintiff introduced testimony in support of all of these issues, and it is not seriously contended that the verdict is without support. The points relied upon for reversal have reference to rulings made on the admission and rejection of testimony, to the instructions given, and to the proposition that deceased was, as a matter of law, guilty of contributory negligence.

I. Without setting forth the testimony, it is sufficient to say that the question of contributory negligence was for a jury. For defendant it is contended that deceased was asleep at the time of the collision, but the  
1. **APPEAL:**  
special find-  
ings: conclu-  
siveness. jury in answer to a special interrogatory found this was not true, and, as this finding has support in the testimony, we should not interfere.

II. A witness for the plaintiff, who went to the scene of the collision, and who assisted in pulling the automobile off the horse, was permitted to testify, over objections that he was incompetent, and that the inquiry  
2. **EVIDENCE:**  
matters of  
fact and not  
opinion. called for an opinion and not a fact, that the machine was in gear, and that the brakes were not set. Surely these statements were of facts, and no expert knowledge was required to determine the matter.

III. The following extract from the record presents the next ruling complained of: "Q. What condition was he in when he came out of the hospital? Describe to the jury from what you saw what condition he was in. A.

Well, he had cuts and burns on his face; he had no use of his head and neck and the right arm. (Defendant moves to strike out the statement that he had no use of his head and neck and right arm as a statement of the conclusion of witness and incompetent; the witness is not competent to testify on that subject. Overruled; exception saved.) Q. Now, explain to the jury. Describe what you mean by not having use of his head, neck, arm, and shoulders. A. Whenever he went to turn his head like any person would, he would have to turn his whole body; he had no use of his neck, or couldn't turn his head like any one else. (Defendant moves to strike out the answer for the same reason—statement of a conclusion as to what he could do or could not do. Overruled as to the whole answer if the motion includes the whole; exception saved.) Q. How long did he remain in the condition that you have described? (Same objection for the same reasons and asking for the opinion of the witness. Overruled; exception saved.) A. Why, he remained that way some seven weeks like that when he got so he could do little things around." The witness giving this testimony was not an expert; but we think his testimony was competent, for he really described nothing more than he saw. That such testimony is competent, see *Rheininghaus v. Association*, 116 Iowa, 364; *Stone v. Moore*, 83 Iowa, 186; *Kostelecky v. Scherhart*, 99 Iowa, 120; *Bailey v. Centerville*, 108 Iowa, 20; *State v. Shelton*, 64 Iowa, 333.

Testimony regarding buggy and automobile tracks near the scene of the accident, was objected to as calling for the conclusion of the witness. Manifestly these objections are untenable.

A witness was asked if he knew of the habits of the deceased as to his sleeping while driving upon the public highway, and another as to certain statements made by Clyde Scott during his lifetime, in which he stated that he

3. SAME: non-expert evidence: matters of observation.



was in the habit of going to sleep while driving on the highway. All this testimony was excluded, and of this complaint is made. In this connection it should be stated that defendant claimed Scott was asleep at the time of the collision. Where there are no eyewitnesses of a transaction, it has been held that testimony as to the habits of one whose conduct is in question, may be shown as bearing upon his care or the want of it. *Frederickson v. Railroad Co.*, 156 Iowa, 26. See, also, *Dalton v. Railroad Co.*, 114 Iowa, 259; *Gray v. Railroad Co.*, 143 Iowa, 268; *Hall v. Rankin*, 87 Iowa, 261; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737. But the testimony must relate to his general habits and not to particular instances. The general rule in civil cases is that good character, or the reverse, can not be shown in negligence cases. Wigmore on Evidence, sections 64, 65, and cases cited.

In the instant case there were eye witnesses of the transaction, and defendant was permitted to introduce certain admissions said to have been made by plaintiff's intestate regarding the transaction. Under the rules previously announced by us, there was no error in the rulings, and in any event no prejudice. Answers to the questions necessarily would have involved Scott's conduct with reference to another horse and vehicle, and in one instance, at a time a year or more prior to the accident. The testimony, even if admissible, was so inconsequential in character that we would not be justified in reversing the case. Under the testimony, the jury might very well have found for plaintiff, although he was asleep at the time of the collision.

Mrs. Kate Scott, Clyde's mother, was called as a witness and permitted to testify, over objection, that deceased was her son, and that she had given him his time and permitted him to work for himself; that he collected his own wages, attended to his own business affairs, and owned property in his own

4. CONTRIBUTORY  
NEGLIGENCE:  
evidence:  
habits.

5. ADMISSION OF  
EVIDENCE:  
harmless error.

6. EVIDENCE:  
transactions  
with a de-  
cedent.

name. The only specific objection was that the question eliciting this information called for a personal transaction with one deceased; that the witness was incompetent; and that the statement would be a conclusion of the witness. There was also a general objection that the testimony was incompetent. None of these objections were tenable. This testimony will be considered again when dealing with the instructions.

It should also be stated that the son Clyde, was married on November 16, 1910, which was something like three months after the accident. These are all the rulings on the testimony which need be considered.

IV. The trial court gave the following instructions:

You are instructed that it is the law of this state that no person shall operate an automobile on a public highway at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb of any person, and not at a greater average rate than twenty miles per hour. You are instructed that the statute expressly authorizes the use of automobiles on the highway and confers on the operators of such vehicles the same rights in the road as are accorded to the drivers of other vehicles, and you are instructed that if the defendant operated his automobile with such care as an ordinary cautious and prudent man would use under like circumstances, having a regard for the use of the road at the time by others (he being bound to know that people were likely to be traveling upon the same), and using reasonable and ordinary care under all of the circumstances, there can be no recovery, and you are instructed that, while a party operating an automobile at an average speed of more than twenty miles per hour is *prima facie* guilty of negligence, yet this may be overcome by evidence of the facts and circumstances surrounding the case as stated above. All that is required is that he should use such care as an ordinarily cautious and prudent person would use under like circumstances, having a regard for the use of the road at the time by others, and, if he did so, he would not be guilty of negligence.

This is complained of because of the use of the phrase "operating an automobile at an average speed of more than twenty miles per hour is *prima facie* guilty of negligence." The words in parenthesis are also complained of. The instruction, in so far as it relates to speed, was in the language of the statute. Code Supp. section 1571-h. And we see no error in repeating that language although it may be a little obscure. Defendant admitted, while on the stand, that he was running his automobile, at the time of the accident, at the rate of thirty miles per hour, and he also admitted that fact to others. Of course it may be difficult to determine whether or no one is operating an automobile at an average speed of more than twenty miles per hour, without knowing the distance traveled, and time occupied, but that is no reason for withholding a statement of the law as written. It would seem that a "joker" was introduced into this section of the statute, and that it might be well for the Legislature to remedy the matter. If the jury should have thought the court intended to charge that a rate of speed of more than twenty miles an hour was *prima facie* evidence of negligence, still we would not be disposed to reverse the judgment, for, under the circumstances disclosed by this record, we should say that such a rate of speed was *prima facie* evidence of negligence. But this is not what the instruction said.

As to the part of the instruction in parenthesis, we think it is correct, and here copy from a case in Wisconsin the following: "The driver of every automo-

bile on a country road knows that live stock  
8. SAME: operation of automobiles: care. roam about the roads unattended; that travelers on foot, on horseback, and in various kinds of vehicles are found using the highways at all seasons of the year and all times of the day and night; such a driver has no right to expect, and does not expect, a free and unobstructed driveway over a well-defined track, as does the engineer of a locomotive, or even the motorman

of an electric car. The automobile has created a new peril in the use of our public highways—a peril that unfortunately has been greatly enhanced by the recklessness of the operators who propel the machines with the speed of railway trains along crowded thoroughfares. Some rule, commensurate with the public safety, and not unduly harsh or restrictive upon the users of motor cars, must be evolved to meet a situation which has recently arisen.” *Lauson v. Fond du Lac*, 141 Wis. 57 (123 N. W. 629, 135 Am. St. Rep. 30.) This, it seems to us, is a sound principle of law, and we here adopt it as a proper rule for this state.

V. Instruction No. 12 reads as follows: “It being admitted that the deceased, Clyde Scott, was but nineteen years of age at the time of the claimed injury, you are instructed that, if you have found that plaintiff is entitled to recover in this action, she would not be entitled to anything for loss of earnings from the time of the accident or injury, if any, until the date of his marriage, for during that time his earnings in law belonged to his parents, unless the plaintiff has shown you that, prior to the time of the claimed injury, deceased had been given his time by his parents—that is, he had been allowed to work and collect his wages and keep them for his own use without accounting to his parents for the same.” This instruction is challenged because there was no testimony as to emancipation. This is bottomed upon the thought that there was no showing that his father was dead; hence the mother’s testimony hitherto recited was not sufficient to show emancipation. There was testimony from Clyde’s brother that he (Clyde) had been living in his family, attending to his own business and drawing his own wages; and, while there was no testimony that his father was dead, this is the fair import of the evidence. But if this were not true, no such objection was made to the mother’s testimony, and the fair inference from the objection made to her testimony is that

9. EMANCIPATION  
OF MINOR:  
evidence:  
sufficiency:  
waiver:  
instruction.

she was the proper person to emancipate her son. Had the objection been made that she was not the proper person to emancipate him, the matter might easily have been cured. As this was not the objection, the defect was cured. *Kubic v. Zemke*, 105 Iowa, 271, sustains the action of the trial court.

The trial court told the jury that it might allow for damages to the buggy and harness if it found that any such damages were shown, and it is now said that there was no testimony whatever that there was any such damage, and that there was no direct testimony as to the amount of such damage. This is a mistake. There was sufficient testimony to take the matter to the jury upon the question of damages to the buggy. There was no testimony as to any injury to the harness, or as to the value thereof, and it would have been better had the court made no reference thereto. But the instruction authorized recovery for damages to the harness only in the event such damages were shown by the testimony. We must presume that the jury followed the instructions, and that it made no allowance for damages to the harness. There is no reason for supposing that the jury allowed anything for harness damage. The harness was not described, nor was there any testimony as to the value thereof at any time, or as to the damages done. Upon such a record we should not reverse because of the instruction given by the court on this matter. In support of these views see *Trapnell v. City*, 76 Iowa, 747; *Parks v. Town of Laurens*, 153 Iowa, 567.

If the jury disregarded the instructions of the court, the allowance for damages to the harness must have been small in any event, and such allowance would not call for a reversal. The verdict was small in view of the injuries sustained, and such errors as appear in the record are not sufficient to call for a reversal.

No prejudicial error appears, and the judgment will be, and it is,—*Affirmed*.

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T. J. POLLOCK, Plaintiff and Appellee, v. The Board of Supervisors of Story County, Iowa, and Nevada Township Drainage District No. 17, Story County, Iowa, Appellants.

**Drainage: ASSESSMENT OF BENEFITS: REVIEW ON APPEAL.** The fact  
1 that many considerations enter into the assessment of benefits in drainage cases by a board of supervisors will not relieve the courts, on appeal, of the responsibility of trying such questions anew, when properly presented, although the action of the supervisors will not be lightly interfered with.

**Same: COMPARISON OF BENEFITS.** On appeal from an assessment of  
2 benefits to a particular tract it is not necessary that a comparison of the assessment with that of all the other tracts in the district be made, to entitle the question to consideration. Just how wide a range the comparison should take is a matter of judgment in each case, to be exercised by the complaining party at his peril.

**Same: ASSESSMENTS: HOW DETERMINED.** The cost of constructing a  
3 drain across a particular tract within a drainage district is not the basis for making the assessment to that tract and even though the assessment as made by the supervisors is less than the average cost per acre of constructing the drain across that tract, it may not be equitable as compared with the assessment of other tracts. A reduction of the assessment in the instant case by the lower court is held proper.

*Appeal from Story District Court.*—HON. CHARLES E. ALBROOK, Judge.

SATURDAY, NOVEMBER 16, 1912.

THIS is an appeal from an assessment of benefits in a drainage proceeding. From the order of the board of supervisors assessing benefits to the amount of \$875 against him the plaintiff appealed to the district court of Story

county. Upon trial had the trial court reduced the assessment to \$575. From such order of the trial court, the defendants appeal.—*Affirmed.*

*E. H. Addison*, for appellants.

*B. B. Welty*, for appellee.

EVANS, J.—The drainage district involved is located in Nevada Township, Story county. The water course involved has its head a short distance north of the northwest corner of section 5, and extends in a southeasterly course to its outlet some distance southeast of the southeast corner of section 8. The plaintiff is the owner of the south 31.5 acres of the southeast of the southwest of section 5. An eighteen-inch tile drain is laid through his land entering the same on his south line about twenty-seven rods west of his southeast corner, and passing up diagonally to his northwest corner and on to other lands, lying north and west. Between plaintiff's land and the outlet, considerable very large tile was used ranging from eighteen inches to thirty-six inches; much of the land being low and flat. The "base 40" was assessed at \$1,400. Only about six sections were included in the district, and the cost of the drain was necessarily large.

It is urged upon us by appellant's brief that there are so many considerations that enter into the apportionment of the benefits of such a project that we ought not lightly to interfere with the finding of the board of supervisors. We are in thorough sympathy with the suggestion, and have so expressed ourselves in the recent case of *Rystad v. Drainage District*, 137 N. W. (Iowa), 1030. These cases present peculiar difficulties to the courts, and satisfactory conclusions thereon are hard to reach. Nevertheless, the district court can not avoid the responsibility of trying the question

1. DRAINAGE:  
assessment  
of benefits:  
review on  
appeal.

involved when presented by proper appeal. Nor can we avoid the responsibility of reviewing the action of the district court upon proper appeal here.

In our consideration of the case we are necessarily confined to the record as made in the district court, so far as the evidence is concerned. In the record before us we are impressed that there are some considerations which stand out quite prominently in favor of the plaintiff's contention. Whether these were overlooked by the appraisers and the board of supervisors, or whether they were otherwise met, is not made to appear in this record. None of such persons were used as witnesses by either party, and we are left wholly in the dark as to the method adopted by the original assessing tribunal to reach the amount fixed. Plaintiff's land was one of the tracts which was heavily assessed. Doubtless one good reason for this was that the tile passes through his land. It does appear, however, that the elevation of plaintiff's land is not only higher than that to the south and east of it along the water course, but that it is also higher by about three feet along the line of the water course than the land immediately north along such water course. The result of this elevation was to dam up the water to the north of this land and up the water course. From one-third to one-half of plaintiff's land was sufficiently elevated to make tillable ground. The remainder was good pasture land, growing blue grass and timothy. The water course passed through his land in an open ditch. His dry land was in the northeast one-half, and his wetter land was in the southwest one-half. Some comparisons were instituted by the witnesses as to the relative benefits to plaintiff's land and to other land along the course tiled. From a careful reading of the evidence as a whole, we are impressed that the assessment against plaintiff was higher in proportion to benefits than much of the other land, and that the district court was justified in making some reduc-



tion. How much reduction should be made is a more difficult question.

It is urged by appellant that the plaintiff failed to institute a comparison with all of the tracts in the district, and that he confined his comparison to a comparatively few

tracts. But a comparison was instituted with  
2. SAME: comparison of the tracts similarly situated as being located  
benefits.  
upon the tile drain, and they bore the heaviest assessments. Just how wide a range such comparison should take must be a matter of judgment in each given case. And the complaining plaintiff must exercise such judgment at his peril before he rests his case. We think that the range of the inquiry in this case was sufficient for the purpose of the investigation at hand. It is impracticable for us to enter into a detailed discussion of the evidence; nor can we serve any public purpose thereby. It is proper, however, that we take note of some considerations that are pressed upon our attention by appellant's argument.

It is urged that an eighteen-inch tile was laid across plaintiff's land at a depth of nine feet, and at a cost of \$1,136. It is also urged that this was an average cost of

construction through his land of \$31.87 per  
3. SAME: assessments: how determined.  
acre; whereas, the average cost of construction of eighteen-inch tile for the district as a whole was only \$14.20. It is argued therefore, that because the tax assessed was less than \$28 per acre, whereas the cost of construction across plaintiff's land was \$31.87 per acre, he has received greater a benefit than the tax. Further reflection must convince counsel that such argument is not sound. The cost of construction of the drain across particular land is by no means the measure of benefit to such land. Granting, however, that it is a proper subject for consideration, it turns a sharp edge toward the appellants in this case. Manifestly the cost of construction across this land was greatly increased by the great depth of nine feet. This depth was rendered necessary because of its

high elevation and to furnish outlet to the lower elevations of the land further north and up the course. It will not be claimed that any man would lay a tile nine feet deep for the mere benefit of the land thus penetrated. And this great depth manifestly accounts for the increased cost per acre of laying the eighteen-inch tile across plaintiff's land as compared with the average cost of \$14.20 per acre of the rest of the course of the eighteen-inch tile. No lands in the district appear to have been assessed for the full cost of construction across such land. The larger assessments which were brought forward for comparison amounted to only about one-third or one-half of such cost of construction. We must hold, therefore, that there is nothing in this phase of the argument that would justify complaint over the reduction made by the district court. The foregoing discussion should not be taken as an indication that we regard cost of construction through particular land as fixing either a maximum or minimum basis for assessment. On the one hand, the cost of such construction may have been greatly increased for the benefit of the lands above, and, on the other hand, regardless of the cost of construction, whether much or little, the plaintiff may have received a direct benefit of outlet from the drain below him. And he would be assessable with such benefits, even though he had incurred little or no cost of construction across his own land.

As to the amount of assessment fixed by the district court, it amounts to an average of about \$18 per acre for the entire tract. No definite rule is available to us whereby we can say that it should be a little more or a little less. Approximation is the best that we are enabled to do.

It is our conclusion that the amount thus fixed was approximately right, and the order of the trial court is accordingly,—*Affirmed.*

F. A. TOMLINSON, Appellee, v. J. R. GOLDEN and MRS. J. R. GOLDEN, Appellants.

. **Boundaries:** KNOWN MONUMENTS: FIELD NOTES: CONFLICT. The actual survey upon the ground, as ascertained by monuments then made to mark the boundaries of lots and blocks, will control over the paper plat and field notes of the survey. Thus where stakes were set in making the original survey of a tract, to mark the lots, blocks and streets, and were subsequently ascertainable and were recognized by lot owners in building, and by the public in the improvement of the abutting street, the stakes thus set were controlling over a subsequent survey made from the original field notes, but which did not correspond with the original markings.

*Appeal from Polk District Court.*—HON. JAMES A. HOWE, Judge.

SATURDAY, NOVEMBER 16, 1912.

THIS is a controversy between adjoining lot owners over the location of their dividing line. The plaintiff brought this action to enjoin interference with his fence. There was a decree for the plaintiff establishing the line as claimed by him. The defendants appeal.—*Affirmed.*

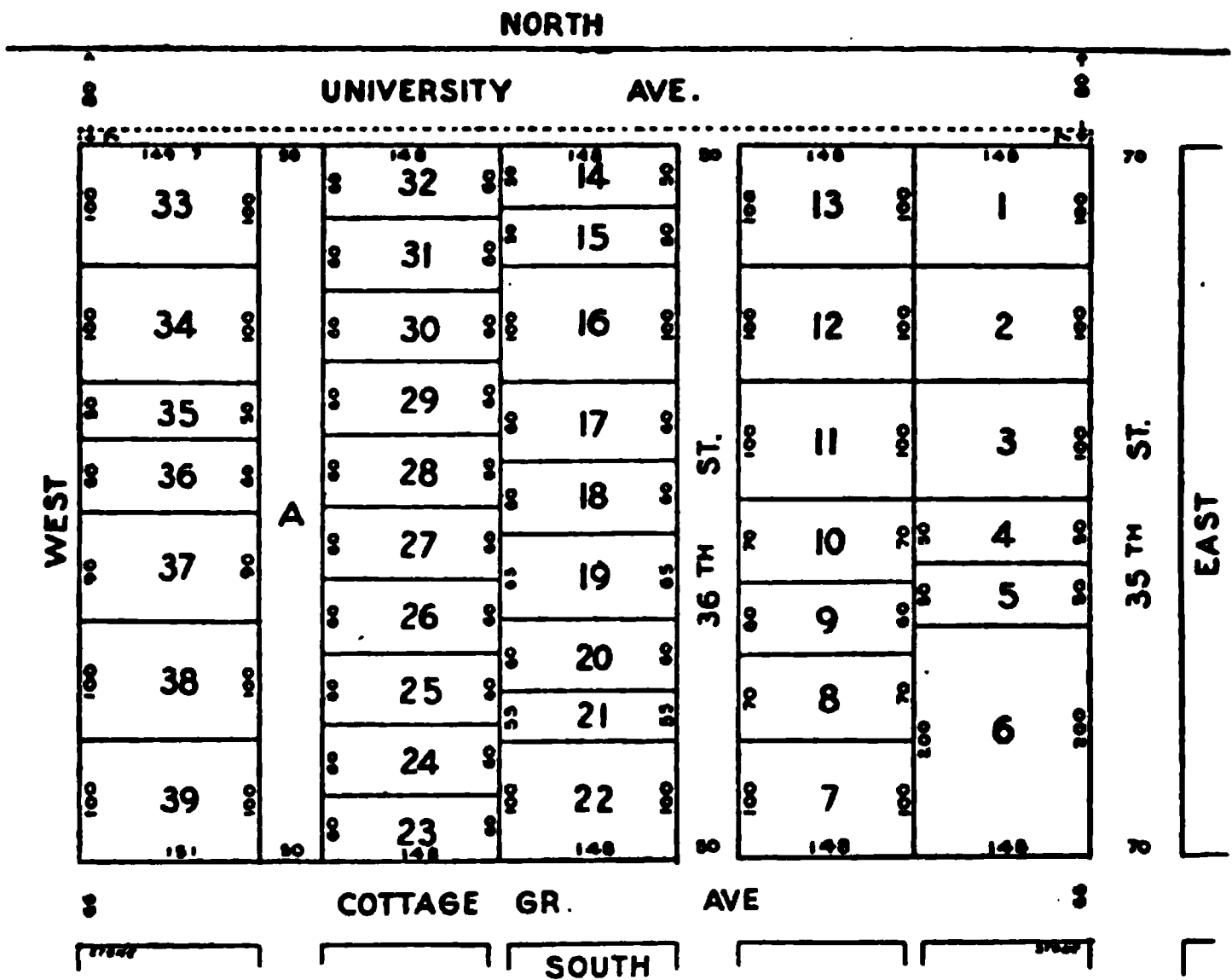
*Ryan & Ryan*, for appellants.

*S. G. Van Auken and Bowen & Alberson*, for appellee.

EVANS, J.—Reference to the following plat will aid to an understanding of the case.

This is a plat of an addition to Des Moines known as Kauffman Place. The plaintiff is the owner of the north half of lot 22, and the defendants are the owners of the south half thereof. This lot faces east on

Thirty-Sixth street. Thirty-Sixth street runs north and south. What appears as "A" street in the plat is referred to as Thirty-Seventh street in this record. From the southeast corner of lot 22 to the northeast corner of lot 14 is a distance of six hundred feet according to the plat, and according to the ground. This dimension also measures the distance between University avenue and Cottage Grove avenue as laid by the recorded plat. It is undisputed that lot 22, as platted, has a dimension of one hundred feet fronting east on Thirty-Sixth street, and that the parties hereto are entitled each to fifty feet thereof. The controversy is over the true location upon the ground of the north and south lines of such lot. Practically all the lots shown on the plat as fronting east on Thirty-Sixth street and numbered from 14 to 22, inclusive, are improved and occu-



pied as residence properties. In locating and taking possession of their lots, the respective owners were guided by the presence of certain stakes which were supposed to represent the respective corners as fixed upon the ground by the

original survey. These stakes were all consistent with each other; and the respective owners successively took possession in accord therewith, and each owner is in possession of his appropriate dimensions indicated upon the plat. The improvement and occupancy of these lots began about 1905. At that time neither Cottage Grove avenue nor University avenue nor Thirty-Sixth street had been improved. The original survey of that ground was made in 1902 by one Dickenson. This survey, however, laid open only six lots on this ground, giving to each a frontage of one hundred feet east on Thirty-Sixth street, and stakes were then set by the engineer one hundred feet apart, to indicate the boundaries of each of such lots. Such plat was not recorded in such form. Just when the plat was made in the above form does not appear. This later plat was filed and recorded in 1906, and after sales had been made therefrom. In April, 1907, the plaintiff purchased the north half of lot 22. He took possession in accordance with the stakes appearing upon the ground, and such possession was consistent with the claims of his neighbor on the north. The defendants also purchased in 1907 a few days prior to the purchase of the plaintiff. They also took possession of fifty feet south of plaintiff's assumed line. In the spring of 1909, after all the improvements above referred to had been made, except those of the defendants, a resurvey or measurement was had in pursuance of the call of the field notes of the original survey, and stakes were set in pursuance of this survey. The result of this survey was to disclose a discrepancy of approximately four feet between the call of the field notes and the stakes and lines which had been assumed and adopted by the respective owners. Under the call of the field notes every occupant was encroaching upon his neighbor to the south to the extent of approximately four feet, and was himself encroached upon in like manner by his neighbor on his north.

In pursuance of this survey, the defendants claimed

a four-foot strip of ground occupied by the plaintiff. It will be seen, therefore, that the controversy involves a possible readjustment of all the partition lines in the block.

The stakes which have been referred to were pointed out to plaintiff as the monuments fixing the boundaries of his proposed purchase, and he accepted them as such. If these stakes, or either of them, represented the monuments erected as a part of the original survey, then we have a case of conflict and discrepancy between the monuments upon the ground, on the one hand, and the field notes and plat as recorded, on the other. In such a case the law seems to be well settled that the survey upon the ground as ascertained by monuments then made to mark the boundaries of the lots is controlling, and the paper plat and field notes must give way thereto. *Root v. Town of Cincinnati*, 87 Iowa, 204; *Bradstreet v. Dunn*, 65 Iowa, 248; *Ufford v. Wilkins*, 33 Iowa, 110; *McDaniels v. Mace*, 47 Iowa, 510. To the same effect see *Olson v. City of Seattle*, 30 Wash. 687 (71 Pac. 201); *O'Farrel v. Harney*, 51 Cal. 125; *Holst v. Streit*, 16 Neb. 249 (20 N.W. 308); *Flynn v. Glenny*, 51 Mich. 580 (17 N. W. 65); *Marsh v. Mitchell*, 25 Wis. 706; *Turnbull v. Schroeder*, 29 Minn. 49 (11 N. W. 147); *Burke v. McCowen*, 115 Cal. 481 (47 Pac. 367); *Morrow v. Whitney*, 95 U. S. 551 (24 L. Ed. 456).

The defendants do not controvert the legal propositions here involved. Their main contention is that the evidence fails to identify the stakes in question as being the monuments made upon the ground at the original survey. The case here is therefore made to turn upon this question of fact. The trial court held the evidence sufficient in that regard. From a careful reading of the evidence we also reach the conclusion that the identity was sufficiently proved. It is true that there is no specific identification by any witness who saw the stakes at the time of the original survey. But it is not legally necessary that the proof of the identity should be in that form. It is undisputed that the engineer

Dickenson made the original survey upon the ground by setting stakes one hundred feet apart to indicate the boundaries of six one hundred-foot lots. In each case, the dividing line was to run due west from such indicated point, and parallel with the avenues. Dickenson also made the resurvey in 1909 from his original field notes, and thereby disclosed the discrepancy if discrepancy there was. He then saw the stakes upon which plaintiff and others relied. As a witness he would neither affirm nor deny whether such stakes were those that were set by him in 1902. If they were, they were not located where he intended to place them. In other words, they were not located in accordance with his field notes. In placing the stakes originally he intended to place them in accord with the notes and paper plat. If, in fact, he placed them otherwise, it was a mistake on his part. Of necessity he could not know that he made this mistake; otherwise he would not have made it. The fact, therefore, that the plaintiff failed to show the identity of the stakes, or the occurrence of a mistake by the testimony of this witness, is not very significant. This remark is not intended to reflect upon the witness. On the contrary, his testimony impresses us as entirely candid. One of the earliest persons to buy and improve in this locality was the witness Townsend. This was in 1905, and before the improvement of Thirty-Sixth street or either avenue. He then intended to buy upon the west side of Thirty-Sixth street. He looked at every lot on that side of the street, and ascertained its supposed boundaries. At the supposed southeast corner of lot 22 he found a stake, and a succession of stakes one hundred feet apart from there to University avenue. Due east from each one of these stakes on the east side of Thirty-Sixth street was a corresponding stake marking the boundaries on that side. He later bought a lot on the east side of the street and has occupied it ever since. He has been familiar ever since with the location of the stakes which he discovered in 1905. From 1905

down to the present time, the evidence of identity is abundant. The stakes and locations relied upon by plaintiff and others are the same as those ascertained by Townsend. They are located due west of similar stakes one hundred feet apart on the east side of Thirty-Sixth street. The fact that other stakes are found also which indicate smaller subdivisions of the original lots does not affect the question. Their location was determined by mere measurement from the original one hundred-foot points. These stakes were universally accepted by all parties in interest as representing the original survey until the survey of 1909. The record discloses no apparent advantage to be gained by any one by a shifting of the location of these stakes. So far as appears, every owner is in possession of the appropriate dimensions indicated by the plat, and this includes the defendants who are in possession of a little more than fifty feet. Their contention at this point, however, is that their possession is an encroachment of four feet upon Cottage Grove avenue, and that they hold such possession by sufferance, and not by right. The evidence shows that the south stake ascertained by Townsend purporting to be the southeast corner of lot 22 was actually located at the southeast corner of defendants' present location. It does appear that Cottage Grove avenue at this point is only approximately sixty-two feet wide, whereas it is supposed to be, according to the plat, sixty-six feet wide. The defendants' sidewalk apparently encroaches upon the platted street, approximately four feet beyond the ordinance provision. But such sidewalk as actually laid is nevertheless in a straight line with its extensions east and west. It is a somewhat inexplicable peculiarity of the situation that the sidewalk between Thirty-Fifth and Thirty-Seventh streets encroaches upon the width of Cottage Grove avenue, and that such encroachment is the result of keeping such sidewalk in a *straight line with its extensions east and west*. In other words, east of Thirty-Fifth street and west of Thirty-Seventh street, Cottage Grove avenue is sixty-



six feet wide. The sidewalk is laid at such points one foot south of the lot line according to ordinance. Beginning, however, at any point in the sidewalk east of Thirty-Fifth street and extending the same west in a straight line, it encroaches upon the avenue as platted between Thirty-Fifth and Thirty-Seventh streets. The sidewalk as actually laid between Thirty-Sixth and Thirty-Seventh streets is laid in such straight line, and yet is five feet south of the lot line of 22 as claimed by defendants, or one foot south of such line as claimed by plaintiff. If the sidewalk were removed to its proper location as contended for by defendants, it would be four feet out of line with the sidewalk which is properly located east of Thirty-Fifth street and west of Thirty-Seventh. Such a change of location would give to Cottage Grove avenue its full width of sixty-six feet, but it would also throw its north boundary out of line for the two blocks mentioned. Cottage Grove avenue has been fully improved with paving, gutters, curb, and parking, and these improvements have been adapted to the encroachment, if such it is. If the monuments upon the ground are controlling as to the property owners, there is nothing in this record to indicate that they are not likewise controlling upon the city. In this view, the mistake or discrepancy, if any, has operated equitably upon all. It does not appear that any property owner has been deprived of any dimension or suffered in location. The sum of the whole trouble seems to be that there is a loss of width to Cottage Grove avenue, and a gain to University avenue.

We think the monuments or stakes upon the ground are sufficiently proved to have been a part of the original survey, and that they must accordingly control.

We reach the conclusion upon the whole case, therefore, that the decree of the trial court was right, and it is accordingly,—*Affirmed.*

ROBERT R. COLLIER v. MCCLINTIC-MARSHALL CONSTRUCTION COMPANY, Appellant.

**Master and servant: NEGLIGENCE: ASSUMPTION OF RISK.** An inexperienced employee directed to assist in riveting the steel frame of a building, in doing which he was required to lie on a plank supported by two beams at its ends and was thus suspended about twenty feet above the ground, can not be held as matter of law to have been guilty of contributory negligence, or to have assumed the risk of the plank being moved by blows of the riveters so as to slip off the beams; it not appearing that his attention was called to the fact that the blows might have that effect, or that the plank would slip or was slipping, and when from his position he could not well observe that fact.

**Same: CONTRIBUTORY NEGLIGENCE: INSTRUCTION.** Where the court clearly instructed that for plaintiff to recover he must prove that he did not contribute to his injuries by his own negligence, the further instructions relative to the defendant's liability, that if its negligence was the proximate cause of or "contributed" to plaintiff's injuries, etc., was not erroneous because of the use of the word "contributed" rather than "caused," and might therefore have led the jury to understand that the plaintiff could recover notwithstanding his own negligence.

**Same: ASSUMPTION OF RISK: INSTRUCTION.** An employee must have fully appreciated his danger, or by the exercise of reasonable care should have known the danger, before he can be charged with an assumption of the risks of his employer's negligence; and an instruction on the subject was not erroneous because stating that he must have appreciated the *full extent* of the danger, as full extent means no more than full appreciation.

*Appeal from Scott District Court.*—HON. WM. THEOPHILUS, Judge.

MONDAY, NOVEMBER 18, 1912.

SUIT to recover damages for a personal injury. Verdict

and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

*Lane & Waterman*, for appellant.

*Ely & Bush*, for appellee.

SHERWIN, J.—The plaintiff was employed by the defendant as a common laborer about a steel frame building that defendant was constructing. The plaintiff worked on the ground about the building for a few days, when the foreman sent him up on the frame to “buck” rivets. Bucking rivets is done with a “dolly hammer,” a tool that has a heavy head, and a handle about four feet long that operates as a lever, when pressed down, and holds the head of the hammer against the head of the rivet, while a man with a sledge strikes the other end of the rivet to form a head there. The place where plaintiff was put to work was about twenty-two feet above the ground. To do this work he had to lie down on a plank that was between six and seven feet long that was laid across two steel beams that run at an angle and met at the place where the rivets were driven. The plank extended over each of the beams about one foot and a half. There were from three to six rivets driven at each place, and it took about fifteen blows of the sledge to finish one rivet. The riveters moved from place to place on the building, and there had been two or three changes of place after plaintiff went to work and before he was injured. The plank, on which plaintiff lay while holding the dolly hammer, was moved along by the vibration caused by the blows of the sledge, and it fell, carrying the plaintiff with it. There were no cleats or other obstructions on the under side of the plank; nor was it fastened to the beams in any way. The plaintiff’s work and position were such, while rivets were being driven, as to render it almost impossible for him to watch the posi-

tion of the plank, and he had nothing to do with changing the plank from place to place.

Appellant contends that the judgment should not be allowed to stand, because the verdict is not supported by the evidence, and because plaintiff was guilty of contribu-

tory negligence, and, knowing that the blows  
 1. MASTER AND  
 SERVANT:  
 negligence:  
 assumption of  
 risk. of the sledge would move the plank, assumed  
 that risk. It can not be said, as a matter

of law, that the plaintiff assumed the risk of the slipping of the plank because of the blows of the sledge, or was guilty of contributory negligence. The record does not show conclusively that plaintiff knew that the blows of the sledge would cause the plank to slip lengthwise to such an extent as to result in its fall. While the average man, without experience, would undoubtedly know that such blows would have a tendency to jar the plank, it would not necessarily follow that all would understand that the effect would be to move the plank in such direction as to cause it to fall. It does not appear that plaintiff's attention was ever called to the fact that the plank would creep, or that it was creeping, although it does appear that those who were familiar with the work knew that the work of riveting would cause the plank to creep, unless it was fastened in some way. These questions were for the jury, and the court properly refused to direct a verdict for the defendant.

The court instructed that to entitle plaintiff to recover he must prove that the defendant was negligent as charged, and that such negligence was the cause of plaintiff's injuries, and,

2. SAME: contrib-  
 utory negli-  
 gence: in-  
 struction. further, that the plaintiff himself did not contribute to such injuries by his own negligence.

The court instructed as follows: "If you should find that the defendant was guilty of negligence as charged, you should then proceed and determine whether such negligence was the proximate cause of or contributed to the plaintiff's injuries; and if not such proximate cause, or con-

tributed to such injuries, you need not proceed any farther with your deliberations, and in that event your verdict must be for the defendant. If you should find that the defendant was guilty of negligence as charged, and also that such negligence was the proximate cause of or contributed to the plaintiff's injuries, you should then proceed to ascertain and determine the amount of plaintiff's damages by reason of such injuries, provided the plaintiff had not been guilty of negligence contributing to such injuries; and provided, further, you do not find that plaintiff assumed the risks and dangers of the work as hereinafter explained."

Appellant complains of these instructions, because the jury was told therein that the defendant was liable if its negligence contributed to plaintiff's injuries. There was an unfortunate use of language in these two instructions; but, taking the charge as a whole, we think the jury could not have understood that the plaintiff could recover, notwithstanding negligence of his own contributing to his injuries. Jurors of average intelligence understand that no liability exists where the defendant is not at fault, and understand equally as well that no liability exists where the injured party is partly to blame for the accident. And in this case the jury could not fail to understand that there could be no recovery by plaintiff if he had been guilty of negligence contributing to his injuries; and this for the reason that the court had given that positive instruction. And such being the case we think the jury must have understood that the word "contributed" as used in the two instructions meant "caused" simply.

In the seventeenth instruction the jury was told that before an employee can be held to have assumed the risk of the employer's negligence, "it must be shown by the preponderance or greater weight of the evidence that he knew and appreciated the danger to which he was subjected, or that by the exercise of ordinary care he would have known the danger and

3. SAME:  
assumption  
of risk:  
instruction.

appreciated the extent thereof." No complaint is made of the instruction so far; but following the language quoted above, and in the same instruction, the court said: "The doctrine or defense of the assumption of risk of this kind involves two elements: (1) That the plaintiff knew and appreciated the full extent of the danger to which he was subjected; and (2) that he voluntarily put himself in the way of that danger." Appellant says that this part of the instruction made the assumption of risk depend on the fact that the plaintiff knew and appreciated the full extent of his danger. In *Huggard v. Refining Co.*, 132 Iowa, 724, we said that, generally speaking, full appreciation of the danger is necessary, and we think that the correct rule, because the authorities generally hold that there can be no assumption of risk, unless the party knows of and appreciates the danger, or in the exercise of reasonable care should know the danger, and a party can not be said to appreciate danger when he is only partially sensible of it. The instruction criticised here, while it uses the words "full extent," can mean nothing more than full appreciation of the danger, and, as so construed, it was not erroneous.

Error is predicated on rulings on defendant's objections to certain testimony; but no such prejudice appears as would warrant a reversal. The judgment is,—*Affirmed*.

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STATE OF IOWA V. C. W. and LULU JOHNSON.

**Intoxicating liquors: SEIZURE: EVIDENCE.** Where it appeared that defendants kept a restaurant and grocery store, occupying the same building as a residence, and that a barrel of beer belonging to them was kept in the grocery department, a *prima facie* case was made authorizing seizure of the beer, as having been kept for unlawful sale; and the question of whether the beer was owned and kept by defendants for their personal use was for the jury, under the evidence, and the order discharging the defendants and exonerating the bond was erroneous.

*Appeal from Polk District Court.*—HON. W. H. MOHENRY,  
Judge.

TUESDAY, NOVEMBER 19, 1912.

IN proceedings instituted before a justice of the peace of Polk county for the condemnation and destruction of a barrel of beer, alleged to have been kept by defendants for sale in violation of law, the justice ordered that said property be condemned and destroyed. On appeal to the district court, the case was taken from the jury, after the introduction of the evidence, and the defendants were discharged; the sheriff being ordered to return the liquor seized to the defendants. From this order, the plaintiff appeals.—*Reversed.*

*George Cosson, Attorney General, and John Fletcher, Assistant Attorney General for the State.*

No appearance for appellee.

PER CURIAM.—The evidence received for the state tended to show that defendants were running a restaurant and grocery store, residing in the same building, and that the liquor seized was the property of defendants and kept in the grocery store. By Code, section 2427, it is provided that "the finding of intoxicating liquors in the possession of one not legally authorized to sell or use the same, except in a private dwelling house which does not include or is not used in connection with a tavern, public eating house, restaurant, grocery or other place of public resort, or the finding of the same in unusual quantities in a private dwelling house or its dependencies of any person keeping a tavern, public eating house, grocery or other place of public resort, shall be presumptive evidence that such liquors are kept for illegal sale." By Code, sections 2413-2416,

it is provided that intoxicating liquor kept for illegal sale may, in a proper proceeding, be seized, condemned, and destroyed.

The evidence, therefore, made out a *prima facie* case for the condemnation of the liquor seized, and the question of fact, as to whether the evidence tending to show that the liquor was owned and kept for the personal use of defendants was sufficient to overcome the *prima facie* case made out for the prosecution, was for the jury. The ruling of the court, taking the case from the jury, was therefore erroneous as a matter of law, in denying to the evidence for the prosecution the presumptive force given to it by the statute. Although we find that the court erred, as a matter of law, in its ruling taking the case from the jury, we have no authority to reverse the judgment on that ground. Having pointed out the error committed by the lower court, we have performed the function delegated to us on appeal by the state in a criminal case. See Code, section 5463.

The decision of the lower court, discharging the defendants and exonerating their bond, and directing the return of the liquor seized to the defendants, is affirmed; but the ruling of the court directing a verdict for the defendants is,—*Reversed*.

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J. T. CHENY and T. F. FLAHERTY v. THE CITY OF FORT DODGE, Appellant.

**Municipal corporations: STREET IMPROVEMENT: CHANGE IN PLAN:**

**I ASSESSMENTS: OBJECTIONS.** Under the statutes relating to special assessments for street improvement, the question of whether a variance between the improvement as made and that contemplated by the preliminary proceedings is sufficient to avoid a special assessment, should be raised by objection before the council and upon appeal from its action to the court. The mere fact of such a variance, not affecting the substantial character of the improvement, will not deprive the council of jurisdiction to make the assessment.



**Same.** Where a street improvement as made does not materially affect  
2 the convenient use of the street by a property owner, or deprive  
it of substantial value to him, he can not for the first time on  
appeal raise the objection that the improvement was not as con-  
templated by the proceedings of the council.

**Same.** Property owners have a right to the use of an abutting street  
3 for any proper purpose in connection with their business, and the  
availability of its improvement for such future use may be con-  
sidered on the question of whether a special assessment for that  
purpose exceeds the benefits; but a mere departure from the  
original plan, not affecting the substantial character of the im-  
provement so as to render the contract under which it was made  
invalid, will not justify an annulment of the entire assessment.

*Appeal from Webster District Court.*—HON. CHARLES E.  
ALBROOK, Judge.

TUESDAY, NOVEMBER 19, 1912.

THE plaintiffs filed before the city council of Ft. Dodge their objections to a special assessment on their property for a street improvement. Thereupon the city council reduced the assessment from \$734 to \$500, and from the action of the council in confirming the assessment in the latter amount the plaintiffs appealed to the district court and filed a petition in equity renewing the objections made before the council, specifying other objections to the assessment, and praying that said assessment be declared unwarranted, illegal and void, and that it be annulled. After hearing the case on its merits, the court held that the city did not have lawful right or authority to make or levy the assessment, for the reason that the improvement, as actually constructed, did not comply with the specifications and contract therefor, and was materially and radically different from the improvement provided for in the preliminary proceedings and contract; and the court thereupon decreed that the entire assessment be annulled, set aside, and canceled. From this decree, the defendant appeals.—*Reversed.*

*Mitchell & Fitzpatrick*, for appellant.

*Healy, Burnquist & Thomas*, for appellees.

McCLAIN, C. J.—By preliminary proceedings in every respect regular and valid, so far as this record discloses, the council of the defendant city ordered the paving of Seventeenth street in that city from Twelfth Avenue South to Third Avenue North, according to plans and specifications calling for a double roadway from Twelfth Avenue South to Fifth Avenue South, each roadway sixteen feet in width, with a parking in the center of the street thirteen feet in width, and a single roadway thirty feet in width from Fifth Avenue South to Third Avenue North. A contract was let for the laying of this paving in accordance with these plans and specifications at a specified price per square yard.

After the contract was let, two petitions were presented to the city council, signed by all the owners of property abutting on Seventeenth street between Fifth Avenue South and Third Avenue North, except the plaintiffs, asking that the plan of paving that portion of the street be changed and that between these limits the street be boulevarded in the same manner as the portion of the street south of Fifth Avenue South; that is, that between the limits prescribed there be a double roadway of sixteen feet in width, with parking thirteen feet in width along the middle, except at street and alley intersections. The city council adopted a resolution granting the prayer of the petitions, subject to the written approval and consent of the contractor. Although the contractor did not file a written consent to this modification of the contract, he did, in fact, orally, before the city council, accept such modification, and he proceeded to construct the entire pavement in accordance with the plans and specifications, with the modification above indicated.

After the completion of the pavement and within the time provided by law, plaintiffs presented to the city council in due form their objections to the assessment on their property, which abuts on Seventeenth street north of Fifth Avenue South, with a frontage of one hundred and sixty-five feet, specifying various grounds of objection, some of which are not now insisted upon. The objections pertinent to the controversy as now presented were that the pavement, as constructed with double roadway and parking in the center, was a different improvement from that provided for in the preliminary proceedings and contract, which contemplated a single roadway thirty feet in width, and that the improvement, as thus constructed, was unauthorized; and, further, that on account of the change in plan the best results from bidders were not obtained for the improvement as constructed, and the contract price was far in excess of what it would have been had the city proceeded under the original plan. The last objection is not now urged, and there is nothing in the record to support it. It appears that after the filing of these objections the city council reduced the assessment on plaintiff's property from \$734 to \$500, and that this reduction was more than sufficient to cover the increased cost of the pavement in front of plaintiffs' property resulting from the construction of two roadways each sixteen feet in width, instead of one roadway thirty feet in width.

In their petition filed in the district court on appeal from the action of the council in overruling their objections to any assessment being made on their property, the

1. MUNICIPAL objections before the council were amplified; but the substantial complaint was still that the pavement, as constructed, was not the one contracted for or provided for in the preliminary proceedings, and that the assessment was therefore void and nonenforceable, with the prayer that the assessment to plaintiffs on account thereof be annulled.

CORPORATIONS:  
street improve-  
ment: change  
in plan: assess-  
ments: objec-  
tions.

The statutory provision as to objections found in the Code, is as follows: "Sec. 824. All objections to errors, irregularities or inequalities in the making of said special assessments, or in any of the prior proceedings or notices, not made before the council at the time and in the manner herein provided for, shall be waived except where fraud is shown."

There is also a provision in the Code, relating to appeals from the council in such cases, as follows: "Sec. 839. Any person affected by the levy of any special assessment provided for in this chapter may appeal therefrom to the district court within ten days from the date of such levy, by serving written notice thereof upon the mayor or clerk and filing a bond for costs, to be fixed and approved by either of said officers. Upon such appeal, all questions touching the validity of such assessment, or the amount thereof, and not waived under the provisions of this chapter, shall be heard and determined. The appeal shall be tried as an equitable action, and the court may make such assessment as should have been made, or direct the making of such assessment by the council. The costs of the appeal shall be taxed as in other actions."

In 1900 the General Assembly enacted an additional statute, relating to special assessments (28 G. A., c. 29), requiring that such assessments shall be in proportion to the special benefits conferred upon the property thereby, and not in excess of such benefits, and not in excess of twenty-five per centum of the actual value of the property at the time of the levy; and, further, that the excess of the cost over the special assessment which may be levied on abutting property shall be paid out of the general fund of the city. In this statute sections 824 and 839 of the Code, above quoted, are reaffirmed as applicable to all special assessments, with this additional provision, that, "upon appeal, the court shall determine all questions, including that of benefits to the property assessed."

Under these statutory provisions we have recently held that the question whether the variance between the improvement, as constructed, and that provided for in the preliminary proceedings is sufficient to invalidate the assessment is an appropriate matter of inquiry for the city council, and that the mere fact of such variance, without regard to its materiality and extent, does not deprive the council of jurisdiction to make the assessment; the remedy of the property owners being by objection before the council and by appeal from its action. *Shaver v. Turner Improvement Co.*, 155 Iowa, 492. In that case the decisions of this court particularly relied upon for appellee are reviewed, and the case of *Hubbell v. Bennett*, 130 Iowa, 66, so far as it was therein held that any departure from the plans and specifications under which the contract was made deprived the council of jurisdiction to levy the assessment, was overruled.

The purpose of the statutory provisions above referred to clearly seems to have been to relegate the property owner to his remedy by objection and appeal in all cases where the city council has not exceeded its jurisdiction; and the holding of the *Shaver* case, just cited, is, in effect, that in the case of a mere departure from the plans and specifications, not substantially changing the nature of the improvement, the council does not lose jurisdiction to make assessment for the improvement as constructed, but may, on objections, grant the property owner such relief as he should have, and that on appeal the district court may review the action of the council and grant the relief which should have been granted by it.

The objections to the assessment presented by plaintiffs to the city council and on appeal to the lower court were predicated upon the contention that any departure from the plans and specifications rendered the attempted assessment against plaintiffs for the improvement illegal and void. It was not objected that

2. SAME.

the boulevarding of the street, departing in that respect from the plans and specifications, so far as they covered the improvement of Seventeenth street in front of plaintiffs' property, rendered the use of the street less convenient to plaintiffs, or deprived it of substantial value to them. It is conceded that the street has been paved, and that the council might originally have provided for such paving as has been in fact constructed. It must be presumed that the paving is of some advantage to the plaintiffs, as well as to the other abutting property owners. If the benefit is, on account of the peculiar situation and use of plaintiffs' property, less than the amount of the assessment, such objection might have been raised and determined by the court on appeal. But no such objection was made until it is now urged in this court that, as plaintiffs' property is used for business purposes, a boulevarded street in front of it is less convenient than a single paved roadway, such as was originally contemplated. If such objection had been made, it would have been substantially without support in the evidence, so far as the present use of the property is concerned; for it appears that before the pavement was constructed the building on plaintiffs' property, which is used for manufacturing purposes, was provided with loading platforms on a cross street and alley, and that Seventeenth street was not used in any such way as to require the turning of wagons therein, in order that material be delivered to or taken from the building.

Of course, the plaintiffs have the right to make use of the street for any proper purpose in connection with their property, and the availability of the pavement, as constructed, for future use in connection with

**3. SAME.**

such property may be well taken into account in determining whether the amount of the assessment exceeds the benefits to the property with relation to such future proper use; but it is not contended that the benefits

from the pavement, as constructed, are less than the amount of the assessment.

The plaintiffs are attempting to escape any assessment whatever for a beneficial improvement in front of their property on account of a change of plan made by the city council, which, so far as it appears from this record, does not deprive the improvement of its beneficial character, so far as plaintiffs are concerned. Plaintiffs have been relieved by the council of the additional burden imposed by the change in the increase of the number of square yards of paving involved. Had the plaintiffs objected that by reason of the boulevarding of the street the improvement was of no substantial benefit to them, they might have been relieved entirely of the obligation to pay for it. But we are unwilling to hold that a mere departure in plan, not affecting the substantial character of the improvement, and not rendering the contract under which it was made invalid, will justify an annulment of the assessment *in toto*.

The conclusions above indicated make it unnecessary that we discuss the question whether plaintiffs are estopped by acquiescence in the improvement from raising the objection that the assessment is invalid.

The decree of the trial court is therefore,—*Reversed*.

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STATE OF IOWA v. JOE SAMPSON, Appellant.

**Criminal law: LARCENY: FORMER JEOPARDY.** The theft of several  
I articles at one and the same time, and by the same act, is an indivisible crime, even though the articles stolen belong to different persons and the takings were separated by a brief interval of time; and punishment for the theft of one of the articles is a bar to a subsequent prosecution for the theft of part or all of the other articles. In this action conviction for simple larceny for theft of a watch from one of defendant's roommates was a bar to a subsequent prosecution for larceny from the dwelling, based on the theft of money from another roommate at the same time.

... the former prosecution for simple larceny was before a justice of the peace, and the latter prosecution was upon the charge of larceny from a dwelling house, of which a justice would have no jurisdiction; still as the former offense was included in the latter charge, the conviction for simple larceny was a bar to subsequent prosecution.

**REMARKS.** Although the larceny may have been from a dwelling house, the state may disregard this aggravating circumstance and charge the defendant with simple larceny; and having done so, it is in no position to question the validity of a conviction of the offense as charged, which was clearly within the jurisdiction of the court.

*Appeal from Cerro Gordo District Court.*—HON. J. F. CLYDE, Judge.

TUESDAY, NOVEMBER 19, 1912.

FROM a judgment convicting him of larceny from a dwelling the defendant appeals.—*Reversed.*

*F. A. Ontjes*, for appellant.

*George Cosson*, Attorney General, and *John Fletcher*, Assistant Attorney General, for the State.

LADD, J.—The accused, with Charles Bergman and Hans Olson, occupied the same room at 205 Hoyt street, in Mason City, and had done so for several weeks. In the evening of February 17, 1911, he retired at about 10 o'clock, and the others shortly afterwards, and, after they had fallen asleep, he arose, dressed, and seizing Olson's watch from the dresser and Bergman's purse containing \$42 from his trunk, departed. He was subsequently arrested and two informations filed with a justice of the peace, the one, sworn to by Olson, charging him with petit larceny of the watch and the other, sworn to by Bergman, alleging the larceny of the money from a dwelling. He



pleaded guilty to both informations, and was immediately sentenced to serve a term of thirty days in the county jail on the former charge, and bound over to the grand jury on the latter, and was later indicted for the offense of larceny from a dwelling house. When put on trial, he pleaded his conviction of larceny of the watch by the justice as a bar to his prosecution under the indictment. On this issue, the court instructed that, "if in point of time and circumstances the taking of the watch and money was done on a single act or transaction, then there was but one crime, and your verdict must be for the defendant. But, if you find from the evidence that in point of time and circumstances the taking of the watch and money were done as separate acts and transactions, and not a single act or transaction, then the conviction of the crime of larceny of the watch would not bar a conviction of larceny of the money described in the indictment."

Appellant insists that no such issue was raised by the evidence, and in this we concur. The taking was from the same room, and, though the watch was stolen from the dresser and money from the trunk, these

2. CRIMINAL LAW:  
larceny: former jeopardy.

were parts of the same transaction perpetrated at the same time. That an instant or several minutes may have intervened between seizing the watch and the purse can make no difference if these were a part of the same transaction wherein the accused carried out his design of stealing these articles. Nor does the circumstance that the property belonged to different persons render the transaction divisible into two offenses. The state may not split up and prosecute separately distinct parts of the same crime. Undoubtedly, many authorities may be found holding that where a man simultaneously takes two or more articles belonging to different persons, even though at the same time, he may be separately prosecuted for the taking from each owner.

In *State v. Thurston*, 2 McM. (S. C.) 382, the

prisoner stole cotton belonging to three different persons, and the conviction of larceny in stealing that of one was held not to be a bar to prosecution for theft from the others, saying "the stealing of the goods of different persons is always a distinct felony, or may at least be so treated by the solicitor, if in his discretion he thinks proper so to do." See, also, *Commonwealth v. Sullivan*, 104 Mass. 553; *United States v. Beerman*, 5 Cranch, 420, Fed. Cas. No. 14,560. But these and like decisions in England have not been followed generally in this country. In *State v. Emery*, 68 Vt. 109 (34 Atl. 432, 54 Am. St. Rep. 878), the court states the rules sustained by the clear weight of authority as follows: "The theft of several articles at one and the same time and place, and by one and the same act, constitutes but one indivisible crime, even though the articles belong to different owners; and the judgment of conviction or acquittal of the theft of one of the articles is a bar to a prosecution for the theft of the others. A prosecution and conviction or acquittal for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime. It is equally well settled that if, on the same expedition, there are several distinct larcenous takings, as taking the goods of one person at one place, and afterward taking the goods of another person at another place, and so on, as many crimes are committed as they are several and distinct takings." In *Lurton v. State*, 7 Mo. 55 (37 Am. Dec. 179), the larceny was of goods belonging to Curle and Gibson, and instructions embodying the above principles were refused, and the verdict was held to be error. See, also, *State v. Morphin*, 37 Iowa 373. In *State v. Hennessey*, 23 Ohio St. 339 (13 Ohio Rep. 253), conviction was reversed on the same ground; the court saying: "The particular ownership of property which is the subject of a larceny does not fall within the definition, and is not of the essence of the crime. The gist of the offense consists in feloniously taking the

property of another; and neither the legal nor the moral quality of the act is at all affected by the fact that the property stolen, instead of being owned by one or by two or more jointly, is the several property of different persons. The particular ownership of the property is charged in the indictment, not to give character to the act of taking, but merely by way of description of the particular offense." In *Hudson v. State*, 9 Tex. App. 151 (35 Am. Rep. 732), the prisoner was accused of the theft of a gold watch of Mrs. Hurndall taken from her room, and pleaded in bar a conviction of the theft of money and goods of her son taken from another room in the same house on the same night. On the trial the prisoner requested the court to instruct that, "when a variety of articles are stolen at the same time and from the same place and from the same or different persons, it is only one offense." The court gave the instruction, with this qualification added: "The proof must show, before the jury can consider a transaction to constitute only one offense, that the articles stolen were in possession of the same party and taken from the same place and at the same time, and if any reasonable space of time elapses between the taking of one and the taking of the other articles or they are taken from different places, it will be two distinct offenses." The court disapproved of the modification, saying, in conclusion, that:

In order to avoid misapprehension, it may be well to say that, when various articles are stolen at the same time and place, the transaction is not divisible, but is one transaction, and that a prosecution for the theft of a portion of the articles so taken would bar a prosecution for the theft of another portion of the same articles, whether the property belonged to or was in the possession of the same person or different persons. But we must not be understood as holding that the different articles taken from different persons and from different places, as from different rooms of a house occupied by different persons, would necessarily be one transaction; but, on the contrary, that

property thus situated would on proper averments and proof support different prosecutions. For example, if a thief should enter the room of one lodger at a hotel, and should there perpetrate a theft, and should then pass to the room of another lodger and there commit another theft, these would be different thefts, and each might be prosecuted separately, and a conviction or an acquittal for the one would be no bar to the prosecution of the other. So in case of one horse being taken from the inclosure of A., and another from the inclosure B., these would be separate offenses. What the law prohibits is the cutting up of one transaction into different offenses, and holding one accused liable for more than one penalty when there has been but one violation.

See, also, *Jackson v. State*, 14 Ind. 327; *Roberts v. State*, 14 Ga. 8 (58 Am. Dec. 528); *State v. Williams*, 10 Hump. (Tenn.) 101; *State v. Clark*, 32 Ark. 231; 2 Bishop's New Crim. Law, section 888. In *State v. Eggesht*, 41 Iowa, 575, the holding was that, where one at the same time and by the same act passed to a teller of a bank four forged checks, he was guilty of but one offense, and that a conviction for altering one of the checks was a bar to a conviction upon the others. After referring to many of the authorities now cited, the court remarked:

"It seems impossible to maintain the doctrine of the former cases upon principle. If the stealing of various articles owned by different individuals constitutes as many distinct offenses as there are owners, then they can not be united as one offense in the indictment. If one should at the same time, and as one act, steal two watches, each of the value of \$15, and owned by different persons, and another person should steal in the same manner two articles of like value owned by one person, it would be difficult to give a reason satisfactory to the legal mind why one should expiate his offense with a fine of \$200 or imprisonment in the county jail for sixty days, whilst the other should be sent to the penitentiary for the period of five years." See, also, *State v. Larson*, 85 Iowa, 659.

There is no logical escape from this conclusion that the theft of articles belonging to different persons at the same place and time constitutes a single offense. The matter of ownership does not characterize the crime. Neither the legal nor normal phase of the offense is affected by the fact that portions of property taken may have belonged to different persons, and there is no ground, on the one hand, for allowing the state to split up the single act of the accused into subjects for several prosecutions, nor, on the other, for denying it the right to prosecute for the entire transaction as a single offense, aggravated by increased value of all the property stolen. As the watch and purse were stolen at the same place and time, but one offense was committed.

It is argued that, as the accused is now charged with the commission of an offense of which a justice of the peace has no jurisdiction, the former conviction can not operate as a bar. Simple  
2. SAME. larceny is an offense included within the compound larceny from a dwelling house (*State v. Nordman*, 101 Iowa, 446), and if, after having been punished for the simple larceny, he is again punished for compound larceny, in which the simple larceny is included and of which it is a necessary ingredient, he is twice punished for simple larceny—once upon the conviction of simple larceny alone and a second time upon the conviction of the same simple larceny as a part of a compound larceny. There are no degrees in the crime of larceny; the circumstances of the offense being recited in the several statutes by way of aggravation in fixing punishment, and manifestly a conviction thereof in the absence of allegation or proof of these attending circumstances is a conviction of precisely the same offense as when these are included. So it has been held that conviction of petit larceny is a bar to subsequent prosecution for grand larceny on the same facts. *State v. Murray*, 55 Iowa, 530. In *State v. Mike-*

*sell*, 70 Iowa, 176, an acquittal of a charge of larceny from a dwelling in the nighttime was adjudged a bar to a prosecution for robbery for that he had been acquitted of larceny, the essential element of both offenses. It is laid down in 1 Wharton, American Crim. Law, that: "If on a trial of the major offense there can be a conviction of the minor, then a former conviction or acquittal of the minor will bar the major." And, as applying the principle to cases like that under consideration, see *State v. Gleason*, 56 Iowa, 203; *State v. Wiles*, 26 Minn. 381 (4 N. W. 615); *Floyd v. State*, 80 Ark. 94 (96 S. W. 125); *Powell v. State*, 89 Ala. 172 (8 South. 109); *State v. Paul*, 81 Iowa, 597; *State v. Blodgett*, 143 Iowa, 578. The same offense was charged in the information and the indictment. Though the latter included aggravating circumstances omitted in the former, the criminal intent was the same, and we are of the opinion that the conviction of petit larceny under the information in the absence of fraud or collusion was a complete bar to the subsequent prosecution under the indictment for larceny from a dwelling house.

The Attorney General suggests that, inasmuch as the larceny was from a dwelling, the justice of the peace was without jurisdiction in convicting the accused of simple larceny, even though he was charged with the latter offense in the information.

3. SAME:  
jurisdiction.

The state in prosecuting may disregard or omit in the charge lodged against the prisoner any or all aggravating circumstances, and, having done so, is not in a situation to challenge the validity of a conviction of an offense which as charged was clearly within the jurisdiction of the court.

The plea of former conviction should have been sustained.—*Reversed*.

J. M. MORRISON, Appellee, v. PERRY D. ALTIG, Appellant.

**Veterinary surgeons: NEGLIGENCE: LIABILITY.** One holding himself  
1 out as a competent veterinary surgeon, and as such undertakes to treat an animal, is bound to bring to that service the learning, skill and care exercised by the profession generally in that vicinity, although performing the service without compensation; but if he represented himself as a mere student or undergraduate and not a competent veterinary, and disclosed that fact, consenting to undertake the service only upon urgent request and without compensation, and performed the service honestly and to the best of his ability, he would not be liable for resulting injury to the animal. And even a practicing veterinary, who informs the person employing him that he lacks skill and experience in the particular service he is asked to perform, is not liable on account of his professional incompetence.

**Same: SUBMISSION OF ISSUES: PREJUDICE.** Where the defendant's  
2 evidence, in an action for negligence in the treatment of a horse, tended to show that he informed plaintiff that he was not a competent veterinary, but was a student and had not completed his course, that he was reluctant to undertake the service but consented to do so only upon request and without compensation, he was entitled to have his theory of the case presented to the jury by proper instruction, and failing to so present it was prejudicial error.

**Same: INSTRUCTIONS: CLASSIFICATIONS OF NEGLIGENCE.** The classification of negligence as slight, ordinary and gross, in instructions  
3 to juries, is wrong in principle and likely to confuse and mislead them.

*Appeal from Jasper District Court.*—HON. K. E. WILCOCKSON, Judge.

TUESDAY, NOVEMBER 19, 1912.

ACTION at law to recover damages for alleged negligence in the treatment of a diseased horse. Verdict and judgment for plaintiff, and defendant appeals.—*Reversed.*

*Rayburn & Lyman*, for appellant.

*Bray & Shifflett*, for appellee.

WEAVER, J.—The defendant was a student in a school of veterinary science. While at home during vacation he had castrated colts for various persons in that vicinity, and on the occasion in question went to the farm of one Figland to perform an operation of that nature, and while there the plaintiff brought to him a horse having a sweenied shoulder, and asked him to treat it. According to all the witnesses present and testifying upon both sides of the case (except the plaintiff himself), defendant made no profession of being a doctor of veterinary science, but stated that he was still attending school, and had a good record or class standing. The plaintiff alone testifies that defendant said he “was a veterinarian,” but he nowhere denies the statement attributed to the defendant by the other witnesses concerning his attendance at school, and that he expected to return to the school in the fall. Figland, at whose invitation defendant was there and through whose intervention the horse was produced for defendant’s treatment, says defendant told them he was not a veterinarian, but a student, and had not completed his course at school. All agree that defendant was reluctant to undertake the treatment, and offered several excuses for not doing so, but finally consented. He made an incision in the atrophied shoulder of the animal, and injected therein a quantity of turpentine, and advised the plaintiff to turn the horse out to pasture. The shoulder and body of the horse thereafter became seriously swollen and inflamed, and plaintiff was put to expense in curing it. Defendant says the turpentine injected into the shoulder did not exceed  $\frac{3}{4}$  of an ounce, while plaintiff estimated the quantity at twenty-four teaspoonsful. No other witness attempts to state the quantity. Prior to the operation,



nothing had been said about payment for defendant's services and after they had been performed, though payment was offered, he declined it. The experts testifying in the case unite in saying that the injection of turpentine was proper treatment, but the quantity as stated by plaintiff would be excessive, and probably produce injurious results. In his petition plaintiff alleges that defendant held himself out to the public as a skilled veterinarian, and as such accepted employment to treat plaintiff's horse, but performed the service so negligently and unskillfully as to greatly injure the animal, to plaintiff's damage, for which he demands recovery in the sum of \$200. The defendant answers, denying the allegations of the petition.

The right to recover damages in an action of this character is based on the theory that the defendant has failed to discharge a legal duty which he owed the plaintiff, resulting in the injury complained of. The nature and extent of that duty, if any, depends upon the circumstances under which defendant undertook the service. If he was holding himself out to the public or to the plaintiff as a competent veterinary surgeon, and as such undertook to treat the horse, he was in duty bound to bring to that service the learning, skill, and care which characterizes the profession generally in that neighborhood or vicinity, and this duty would be none the less obligatory because he performed the service without compensation. 2 Cooley on Torts (3d Ed.) page 1393.

If, however, he did not hold himself out to be a competent veterinarian, if he was as yet a mere student or learner or undergraduate, and frankly disclosed that fact and consented to undertake the treatment only upon the urgent request of the plaintiff, and without compensation, and performed the service honestly and to the best of his ability, then his duty to the plaintiff was discharged, and he is not liable in this action, even though, the same service, if performed by one claiming to be a competent sur-

1. VETERINARY  
SURGEONS:  
negligence:  
liability.

geon, might justly be characterized as negligent and unskillful in a high degree. *Higgins v. McCabe*, 126 Mass. 13 (30 Am. Rep. 642); *McNevins v. Lowe*, 40 Ill. 209; *Carroll v. Bell* (B. C.) 15 West Law. Rep. 327; *McCandless v. McWha*, 22 Pa. 261.

Even a practicing physician who informs a person employing him that he lacks experience or skill in the service he is asked to perform is charged with no liability on account of his professional incompetence. *Lorenz v. Jackson*, 88 Hun. 200 (34 N. Y. Supp. 652).

The chief complaint of the appellant in argument is that, while the court instructed the jury upon the law applicable to the theory that he was holding himself out as a veterinary surgeon and as such took  
2. SAME: submission of issues: prejudice.  
employment to treat the plaintiff's horse, the instructions did not fully or properly state the law governing his responsibility, if he did not pretend to be a competent practitioner, and at the request of the plaintiff, and without compensation, performed the service to the best of his ability. The objection we think is well grounded. In different paragraphs of the charge the court stated that, if the defendant held himself out as a veterinary surgeon, he would be held in law to exercise the skill and care of veterinary surgeons generally practicing in that vicinity, and that if he failed in this respect, and thereby the horse sustained material injury, he was liable in damages. This is probably a correct statement of the law governing that theory of the case, and we do not understand appellant to seriously question it. But it was equally necessary to a proper submission of the case that the jury be instructed upon the law applicable to the theory of the defense. This the court seems to have omitted unless it is to be found in the sixth and seventh paragraphs of the instructions. If these instructions were intended to cover that phase of the case, we think it must be said they were erroneous.

They read as follows:

(6) You are instructed that if you find from the evidence that the services of the defendant in the treatment of the mare was rendered to plaintiff and received by him as a gratuity and at the request of the plaintiff, and the defendant did not hold himself out to plaintiff as a veterinary surgeon, nor as one skilled in that profession, and you so find, then, before the plaintiff can recover the defendant must have been guilty of gross negligence.

(7) You are instructed that one who undertakes for hire the treatment or care of disease or an injury is bound to use and exercise the skill, learning, and prudence which is ordinarily and usually employed by members of the profession practicing in similar localities, taking into consideration the improved methods and advanced state of learning at the time in question, and failure to exercise such degree of learning or skill or care is negligence, and, if by reason of such negligence on the part of a veterinary surgeon an animal is injured or the owner of the animal is put to unnecessary expense, then the surgeon is to be held liable to the owner of the animal for all damages so sustained.

Concerning the first quoted paragraph, it is to be said that for many years this court has refused to recognize the so-called degrees of negligence—"slight," "ordinary," and "gross"—and the introduction of such distinctions into instructions to juries has been said to be wrong in principle, and likely to confuse the jurors. *Gould v. Schermer*, 101 Iowa, 582; *Kerns v. Railroad Co.*, 94 Iowa, 121.

3. SAME: instructions: classifications of negligence.

In view of the verdict, however, this error might perhaps be said to have been without prejudice, were it not for the seventh paragraph. The jury are there told that any "one who undertakes for hire the treatment or care of disease or injury is bound to exercise the skill, learning and prudence which is ordinarily employed by members of the profession practicing in similar localities." Under the rule thus stated, even if defendant told plaintiff that

he was not a veterinary, and was without skill or experience in such science, and plaintiff with full knowledge of the fact requested and employed him to treat the horse, and he treated it in good faith and according to the best of his knowledge and ability, he would be held to the same high standard of responsibility which governs the case of a professed veterinarian holding himself out to the world as possessed of the learning, skill, and experience which characterizes the profession generally. This we have seen is not the law, and the instruction could not have been otherwise than prejudicial to the defendant. Indeed, in view of the record before us, it is not easy to account for the verdict otherwise than upon the theory that the jury felt bound to follow the instruction last mentioned, and gave it effect in accordance with the interpretation we have here placed upon it. To deny a new trial would in our judgment work an apparent miscarriage of justice.

For the reasons stated, the judgment below will be reversed, and cause remanded for a new trial.—*Reversed.*

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FRANCES PETERS, JOHN SNAVELY, H. K. SNAVELY, WILLIAM SNAVELY, ELIZABETH EBERLY, ANNA KEPFORD, LIZZIE MILLS and IOWA BOOTEN, Appellees, v. LAURA B. SNAVELY-ASHTON, Appellant.

**Attachment: COUNTERCLAIM: AMENDMENT ON RETRIAL: CHANGE OF**  
I **ISSUE.** Where an attachment was dissolved on the ground that the fund garnished belonged to defendant as executrix and not individually, and on a counterclaim for damages the court on appeal held that defendant was not damaged, for the reason that the attachment did not prevent payment to her as executrix, an amendment to the counterclaim on retrial, alleging that plaintiff knew when the fund would be paid to the garnishee and that he would retain the same until the garnishment was disposed of; that while the fund technically belonged to defendant in her representative capacity plaintiff knew that she had an individual interest therein, and that she could not make distribution until the garnishee was

discharged; and that the garnishment was made to injure and deprive her of her interest therein, did not change the issue tendered originally so as to avoid the effect of the prior decision, as it pleaded no facts as the basis of liability not appearing in the former record.

**Same: DISSOLUTION OF ATTACHMENT: ATTORNEY'S FEES.** Attorney's fees are not allowable for procuring the discharge of an attachment, where no property was wrongfully levied upon.

*Appeal from Johnson District Court.*—HON. R. P. HOWELL, Judge.

FRIDAY, FEBRUARY 12, 1912.

IN an attachment suit, the defendant filed a counterclaim on the bond for damages for wrongful suing out of the attachment. Plaintiffs demurred to the counterclaim on various grounds; the substance of the same being that it did not appear from the counterclaim that the defendant had suffered any damages. The demurrer was sustained. The defendant elected to stand upon her pleading, and has appealed.—*Affirmed.*

*Milton Remley, and Ranck & Bradley, for appellant.*

*Wade, Dutcher & Davis, for appellees.*

EVANS, J.—This case has been before us on a former appeal. 144 Iowa, 147. Reference may be had to our opinion on the former appeal for many of the details.

The plaintiffs sued out a writ of attachment against the defendant, and caused the same to be served by garnishment of Remley & Remley, her attorneys. The garnishees had in their hands a certain fund of \$7,900 which belonged to the defendant as executrix or trustee of the estate of her deceased husband, M. F. Snavely. Upon motion in the district court, and upon a showing of the

1. ATTACHMENT:  
counterclaim:  
amendment  
on retrial:  
change of  
issue.

trust character of the fund, the attachment was discharged and the garnishee released. The attachment plaintiffs thereupon dismissed their action. Trial was had upon the counterclaim, and a verdict and judgment rendered for the defendant. From such judgment an appeal was prosecuted to this court as above indicated. The judgment appealed from was reversed and the case remanded. Upon remand of the case, the defendant filed the following amendment to her counterclaim:

That the plaintiffs knew the time when \$7,900, the proceeds of a tract of land belonging to the estate of M. F. Snavely, deceased, would be paid to Milton Remley, attorney for the said defendant; that the plaintiffs well knew that \$1,000 of said fund would be turned over to the said defendant in her individual right, and that one-half of the balance equitably belonged to the said defendant individually, and, had the same been turned over by the said attorney to the said defendant, she would have been entitled to receive therefrom her interest in said fund amounting to between \$4,500 and \$5,000, and, for the purpose of depriving the said defendant individually of the use of said money, the said plaintiffs maliciously directed the said Milton Remley to be garnished, well knowing that the said garnishee could not in the face of said garnishment pay over the said fund to the said defendant, and well knowing that the said garnishment served upon the said garnishee would necessarily retain the said fund in the hands of the garnishee until the garnishment was disposed of; that, while the fund thus garnished may technically have belonged to the said defendant as trustee or executrix, yet the plaintiffs well knew that she had an individual interest therein, and that she could not make distribution to herself or others until the said garnishee was released from the said garnishment, and, for the purpose of injuring the said defendant, the said plaintiffs caused the said fund to be garnished in the hands of the said garnishee to deprive her, and they did deprive her, of the use and enjoyment of her interest therein, to the great damage of the said defendant in the sum of, to wit, \$300.

This amendment presents the only change in the pleadings after the reversal and remand of the case. The demurrer was based in the main upon our former opinion. It is the contention of appellant that this amendment so changes the issues tendered that it is not necessarily controlled by such former opinion. Examination of such opinion satisfies us that its conclusive effect is not avoided by the amendment to the counterclaim. Whatever allegations are contained in such amendment additional to the pleadings as they appeared before us on the former appeal, they are more in the nature of legal conclusion than a statement of new facts. We find no essential fact pleaded as a basis of liability which did not appear in the former record. In the former opinion we said:

The motion to discharge it (the attachment) was sustained on the theory that defendant was holding the property attached by garnishment either as executrix or trustee, and that plaintiffs were not entitled to any aliquot or part thereof until an accounting in the court of probate or otherwise. Defendant was not claiming the money attached as her own, nor could she under this record, for it was not hers. She was entitled to it in a representative capacity as trustee or executrix, and upon that theory she secured the release of the garnishment. She does not now claim that in her individual capacity she was entitled to this fund. She and her attorneys frankly admit that save as to \$1,000 plaintiffs had as much right to the proceeds as she did, and it must have been on this theory that the garnishment was discharged. . . . We don't think that the garnishment of the attorney as debtor of defendant in her individual capacity prevented this attorney from paying over the money to the defendant in her representative capacity as trustee or executrix. He, in fact, owed her no more individually than he owed the plaintiffs. He was holding the money for the defendant purely in her representative capacity, and she could not in her own right recover the money from him. . . . The garnishee, Remley, made no answers to the notice of garnishment and we don't think that under the garnishment he was obliged

to hold any funds which belonged to, or was responsible for any debt owing to defendant as executrix or trustee. She was no more entitled thereto in her individual capacity than were the plaintiffs, who had practically the same interest in the funds that she did. . . .

The appellant presses the claim now that she is entitled to recover attorney's fees for obtaining the discharge of the writ of attachment as distinguished from the discharge of the levy of the writ. The argument is that, even though she were not damaged by the seizure of any of her property under the writ, she was nevertheless damaged by the wrongful issuance of the writ in the first instance, and that she is entitled to recover her attorney's fees for obtaining a dissolution of the same. No damages for wrongful issuance of a writ have ever been allowed in this state in the absence of a levy. Neither is there any provision of the statute whereby a writ of attachment can be quashed or dissolved pending the action, provided the statutory requirements are complied with in obtaining the same. In the absence of defect in the proceedings or bond, a motion to discharge the writ will not lie. The alleged grounds of an attachment can not be controverted by evidence for the purpose of quashing the writ. They can be traversed in the main action only by a counterclaim on the bond. *Sturman v. Stone*, 31 Iowa, 115. If an excessive levy be made or if exempt property be attached, the defendant may move for a discharge of the attachment as to such property. If the property of a third party be wrongfully attached, such party may also appear and move for a discharge or release. It is only in some such sense that the defendant can move to dissolve or discharge an attachment. A writ of attachment is not, like a writ of temporary injunction, subject to dissolution pending the action upon mere preliminary investigation of the facts. Code, sections 3929-3933. The former opinion is quite conclusive that

2. SAME: dissolution of attachment: attorney's fees.



the garnishment of Remley & Remley was not effective to interfere with the proper disposition of the trust fund. Whether the plaintiff could maintain an action for malicious prosecution independent of the bond we need not determine. It is certain that she could not set it up by way of counterclaim in the main action. We think that the amendment to the counterclaim upon which the appellant relies clearly runs counter to our former opinion and that it does not essentially change the cause of action.

We think the ruling of the trial court was in accord with our holding, and it must therefore be affirmed.

Appellant's motion to strike amended abstract of appellee must be overruled. Such amendment, however, does include considerable unnecessary matter. Only one-half the cost thereof will be taxed in favor of appellee.—*Affirmed.*

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LUCY J. LAUMAN, Appellant, v. WILLIAM P. FOSTER,  
et al.

**Corporations: UNDIVIDED EARNINGS: INTEREST OF LIFE TENANT.** A  
1 stockholder has no right to the earnings of a corporation until a dividend has been actually declared, either in form or in substance; and the enhanced value of the stock by reason of withholding the earnings inures entirely to the benefit of the same, from which a life tenant can derive no advantage prior to an order for its distribution by the corporation.

**Same: WILLS: LIFE ESTATE IN EARNINGS.** A will bequeathing a life  
2 estate in the income of corporate stock means a bequest of the earnings of the stock; the term income having the same significance as the term dividend.

**Same: INCOME FROM CORPORATE STOCK.** A cash dividend upon cor-  
3 porate stock, whether accepted in cash or additional stock taken in lieu thereof under an option granted the stockholders, is acquired as a dividend and goes to a life tenant. But where the corporation increases its capital stock not as a dividend, and permits its stockholders to acquire the new stock in proportion to the amounts held by them, the new stock thus acquired is to be treated as capital, and any amount realized by a trustee holding stock as a

part of his trust, either from a sale of the privilege or an exercise of the same himself and a subsequent sale at a profit, belongs to the body of the trust, and the life tenant is only entitled to the dividends arising therefrom.

*'Appeal from Des Moines District Court.—Hon. W. S. WITHROW, Judge.*

FRIDAY, MARCH 15, 1912.

SUIT to require defendants, as trustees of the estate of George C. Lauman, to pay to plaintiff certain moneys as income derived therefrom; the same having been obtained by virtue of being given the right, as stockholders in a bank, to subscribe for additional stock. The petition was dismissed and plaintiff appeals.—*Affirmed.*

*Power & Power and Thos. Hedge, for appellant.*

*Poor & Poor, for appellees.*

LADD, J.—The plaintiff is the widow of George C. Lauman, who died many years ago. His will was admitted to probate, and therein, among other provisions, he bequeathed his personal estate to three trustees, directing them to deal with it substantially as he might have done, if living, and “that all the rest and residue of my estate be held together, without division, by my trustees during the life of my wife, to whom they shall pay the entire net income of my estate, after deducting taxes and proper expenses of the trust. Payments of the income shall be made every three months, beginning with the first day of the month in which I die.” Other portions of the will indicate what shall be done with the property after the widow’s death. Among other securities of the estate which came into the trustees’ possession were one hundred shares of stock in the Continental National Bank of Chicago, Ill., and with reference thereto it was stipulated that at that

time the capital stock of the bank was \$2,000,000, and its surplus, including all undistributed earnings, was \$206,648.24; that from 1888 until January 1, 1903, dividends were regularly declared and paid quarterly to the trustees on the shares held by them at the rate of 6 percent per annum, from then until January 1, 1910, at the rate of 8 percent per annum, and thereafter at the rate of 10 percent per annum. In April, 1901, the surplus, including undisputed earnings, had increased to \$802,360.91, and the capital stock was increased to \$3,000,000. The bank, in doing so, gave to its stockholders the option to subscribe in proportion to their holdings for the new issue of stock, at par, and the trustees, pursuant thereto, on April 6, 1901, subscribed for fifty shares, paying therefor \$5,000. On September 26, 1902, the trustees disposed of the shares so purchased for \$13,903.75.

In April, 1906, the surplus, including the individual earnings, had become \$1,016,052.99 and the capital stock was increased to \$4,000,000; the stockholders being given the option to subscribe as before, with the exception that the price was fixed at \$200 per share. The trustees purchased thirty-three shares on the 3d day of April, 1906, paying therefor \$6,600, and on June 25, 1908, sold the same at the net price of \$7,220. Prior to this increase, the book value of the stock was \$134 per share, and it was \$151 afterwards. In February, 1906, prior to this increase of stock, the market value was \$259 and thereafter \$240 per share, though it decreased by May 2d to \$228 per share.

In September, 1909, the surplus, including all undivided earnings, became \$3,991,608.12, and the bank increased its stock to \$5,000,000, permitting the stockholders to subscribe as before, but at \$175 per share. On September 6, 1909, the trustees procured fifty shares of the stock at the price stated, and on December 9th of the same year sold the same at the net price of \$14,401.85. Prior to

this increase, the book value of the stock was \$199 and after the increase, \$154 per share. On August 3, 1909, prior to the increase, the market value was \$320 per share, but on September 18th, after the increase, it had fallen to \$267 per share. The trustees have retained the original shares. The option given the stockholders to purchase the additional stock at less than its book value was because of their interest in the capital, surplus, and undivided profits held by the bank. It had been long established and had a valuable and increasing good will, with good prospects of larger business and profits in the future.

Upon this statement of facts, the plaintiff claims the sums of money derived by the trustees in the subscription for and purchase of the stock and sale thereof as a part of the net income directed to be paid to her in the clause of the will quoted; she having received the cash dividends declared on all the stock held by the trustees. It will be observed that the trustees, by exercising the options, derived altogether \$15,175, and that doubling the capital stock in 1901 impaired the book value of the stock from about \$140 per share to \$127; that, inasmuch as more than book value was exacted for the increased capital stock in 1906, such value was enhanced thereby \$17 per share, while the book value was reduced by the increase of capital stock in 1909 \$45 per share. The sole inquiry is whether the difference between what the trustees paid for the stock in the manner described and received on sale should be paid to the plaintiff as income from the estate, or preserved as a portion of such estate for the remaindermen.

It should be said at the outset that whether the earnings of a corporation shall be distributed among its shareholders is purely discretionary, and that until a dividend has been actually declared, either in form or substance, the stockholder has no claim thereto as against the corporation. Any enhancement in the value of stock by reason

1. CORPORATIONS:  
undivided  
earnings:  
interest of  
life tenant.

of withholding the earnings inures entirely to the benefit of the *corpus*, and the life tenant derives no advantage therefrom. This proposition was well expressed in *Moss's Appeal*, 83 Pa. 267 (24 Am. Rep. 164): "As a general rule, nothing earned by a corporation can be regarded as profits until it shall have been declared to be so by the corporation itself, acting by its board of managers. The fact that a dollar has been earned gives no stockholder the right to claim it until the corporation decides to distribute it as profit. The wisdom of such distribution must of necessity rest with the corporation itself. From motives of prudence and self-interest, it is frequently desirable to add all or a portion of the earnings to the capital. This is sometimes necessary as a basis of credit for more enlarged operations. It is often a wise exercise of discretion for a corporation to strengthen itself in this way, and with such discretion a stockholder can not interfere. His only remedy is by an appeal to the ballot at the election for directors. But where a corporation, having actually made profits, proceeds to distribute such profits amongst the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction." See *Soehnlein v. Soehnlein*, 146 Wis. 330 (131 N. W. 739).

"Income," as used in a will bequeathing stock, means the same thing as "dividend." *Reed v. Head*, 6 Allen (88 Mass.) 177. In *Spooner v. Phillip*, 62 Conn. 62 (24 Atl. 524, 16 L. R. A. 461), it was said:

2. SAME: wills:  
life estate in  
earnings.

"The use of the stock seems to be limited to the receipt of dividends and income. The word 'dividends,' if unqualified, signifies dividends payable in money. The word 'income' has a broader meaning, but hardly broad enough to include things not separated in some way from the principal. It is not synonymous with 'increase.' The value of the stock may be increased by good management, prospects of business, and the like. But

such increase is not income. It may also be increased by an accumulation of surplus but, so long as that surplus is retained by the corporation, either as surplus or increased stock, it can, in no proper sense, be called 'income.' It may become producing but it is not income." *Smith v. Hooper*, 95 Md. 16 (51 Atl. 844). See *Gibbons v. Mahon*, 136 U. S. 549 (10 Sup. Ct. 1057, 34 L. Ed. 525). The difficulty involved in the present case is to determine what shall be required as dividends. The new shares of capital were not issued as stock dividends, but at a price, specified by the bank, much below the market value, and the option to buy was extended to the shareholders only. In *Kalbach v. Clark*, 133 Iowa, 215, the differences of opinion with reference to stock dividends was referred to, and the American or Pennsylvania rule approved as best sustained in principal and by authority; and it was there said that "all pure dividends, whether in cash or in stock or other property, are a part of the income, and, when declared, should go to the life tenant, and not to the remainderman, as it is not a part of the corpus of the property, but a part of the income derived from the use and management thereof. Any dividends, so called, presumptively belong to the life tenant, as they are, in the absence of showing to the contrary, assumed to have been divided as profits. If, however, the so-called stock dividends represent the corporate capital—that is, represent nothing but the natural growth or increase in the value of the permanent property, so that there is merely a change in the form of ownership—such stock should go to the remainderman; for in such cases the dividend is a dividend of capital, representing simply an increase in the value of the physical property, good will, or other thing of tangible value."

Where a cash dividend is declared, and at the same time an option granted to the stockholders to acquire additional stock at a price equal to the dividend, the cash or the stock taken in lieu thereof is acquired as a dividend,

and will go to the life tenant. *Brown v. Brown*, 72 N. J.

3. SAME: Income from corporate stock. Eq. 667 (65 Atl. 739); *Davis v. Jackson*, 152 Mass. 58 (25 N. E. 21, 33 Am. St. Rep. 801). But where a corporation increases

its capital stock without declaring a dividend, and gives the stockholders the option to subscribe for the new stock in proportion to that held by them, this is regarded by many authorities as incident to the ownership of the stock, and does not belong, as a privilege, to the life tenant. Such increment is treated as capital, to be added to the trust fund for the benefit of the remaindermen, and this is so whether the trustee of the estate subscribes for the new stock for the benefit of the trust, or sells the right or option to subscribe for a valuable consideration. Of course, the dividends from the additional stock or increase from the proceeds of the sale of the right or option would be a part of the income to be paid to the life tenant. 2 Cook on Corporations, section 559; *Hite v. Hite*, 93 Ky. 267 (20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189); *In re Eisner's Appeal*, 175 Pa. 143 (34 Atl. 577); *Greene v. Smith*, 17 R. I. 28 (19 Atl. 1081); *Brinley v. Grou*, 50 Conn. 66 (47 Am. Rep. 618); *Re Kernochan*, 104 N. Y. 618, 630 (11 N. E. 149); *Smith's Appeal*, 140 Pa. 344 (21 Atl. 438, 23 Am. St. Rep. 237); *Adkins v. Albree*, 12 Allen (Mass.) 359; *Moss's Appeal*, *supra*; *Re Bromlet*, 55 L. T. N. S. 146; 10 Cyc. 560; *Malan v. Hitchins*, 63 L. J. N. S. 797. Extracts from some of these decisions will indicate the reasons for this conclusion.

*Hite v. Hite*, *supra*: "It was also error to hold that the privilege, given by a corporation to its stockholders, to take additional stock at par, when the stock is worth more, belongs to the life tenant. This right stands upon a different footing from the claim to a stock dividend. It is a mere incident of the old stock. It is a right appurtenant to it, and as such is a part of the capital. It can not be fairly considered as income, but is inherent in the

shares of stock in their creation. While the value of the right must depend essentially upon the success of the business of the company, this does not alter the nature of the right, and the stock is properly a part of the corpus of the estate of the owner. This incident of the stock was, at the death of the testator, a part of his estate, and the option merely operated to increase or broaden the capital, or change the manner of the investment. It gave the right to a larger interest in the capacity of the company to make profits, but not to the income itself."

*In re Eisner's Appeal*: "An increase of capital by the issue of new stock to persons paying for it at its par value implies the very reverse of profits earned. The fact that the privilege of subscribing for it is given to existing stockholders, and that it may be sold by them at a premium, is far from proving that the premium is to be regarded as income, the payment or withdrawal of which leaves the original capital unimpaired. The property of a corporation, after payment of liabilities, belongs to the existing stockholders, who therefore are entitled to any and all enhancements of its original value; and such enhancement belongs, not to a tenant for life, but to the remainderman. *Scholefield v. Redfern*, 32 Law J. Ch. 627; *Hubley's Estate*, 16 Phila. (Pa.) 327; *Middleton's Appeal*, 103 Pa. 92. When new stock is issued at par, the actual increase of capital is precisely the amount thus received by the company; and if the new stock has, at the time, an intrinsic value beyond what was paid for it, this presumptively can only be because the holders of the new stock have been put on a footing of equality with holders of old stock, and thus become entitled to share with them in a distribution of assets, should the company be dissolved. The gain of the new stockholders is the precise measure of loss in intrinsic value of the capital of the old stockholders."

In *Brinley v. Grou*, *supra*: "In the case before us,



neither in fact nor form did the corporation make any division, or part with any portion of its earnings in behalf of the stockholders. On the contrary, it manifestly desired to retain its surplus intact and increase its strength by the addition of a million of dollars to its capital; its accumulated earnings all remained its property, and subject to the risks of its business. It offered to the shareholders the privilege of paying in this sum; investors were of the opinion that this privilege was worth a premium, not because it carried with it the right then or ever to demand any portion of the surplus retained in good faith by the company, but presumably because they believed that from the income from its capital, surplus, and business it would make regular dividends largely in excess of the ordinary rate of interest. The increase in market value above cost of the shares constituting the capital of this fund, resulting either from an accumulation of profits by the corporation, or from its vote to permit each one of its proprietors to purchase a fraction of a new share, because he was the owner of an existing one, belonged to and formed a constituent part of this last, and, of course, of the capital. If the trustees had sold the existing share, and thereby had realized the increased value resulting from either of the mentioned causes, the entire proceeds of the sale would have still formed a part of the capital; and the excess in market value above cost of the right to purchase such fraction also belongs to and forms a constituent part of the existing share, and, of course, of the capital; and when the trustees realized this excess by a sale of the privilege the proceeds remained a part of that capital. In short, all of the increase of value which is realized from the act of the trustees in selling either the existing share with the privilege annexed, or the privilege severed therefrom, belongs to the capital; purchasers pay it from their money; all that is realized from the act of the corporation in making dividends belongs to the life tenant."

It seems to us that the reasons presented in the above quotations are unanswerable, and that these are in point, as applied to the case at bar. Prior to each increase of stock, that held by the trustees, including the part of surplus and earnings undistributed, belonged to the estate, and not to the life tenant. The bank, in increasing its capital stock, did not undertake to distribute any of its earnings or surplus. All of both were retained as a part of its funds with which to continue in the development of its business. In issuing the additional stock in 1901, the book value of each existing share decreased about \$13 and in 1909 the decrease therein by increasing the capital stock amounted to \$45 per share. As the existing shares belonged to the estate, the manifest effect was to impair the book value of the existing shares to the extent the book value of the new shares exceeded the price paid. And, conversely, as the price of the additional stock issued in 1906 exceeded the book value of existing shares, that of the latter was enhanced by increasing the capital stock by \$17 per share. If, then, the life tenant be entitled to the income on the new stock or the proceeds of the sales of the options, in what manner has her income been impaired? Not at all. This being so, there is no ground for construing the option to buy additional stock as something it does not purport to be—a dividend. The bank, in increasing its capital, parted with nothing, but greatly increased its assets by the sale of stock. Every cent of its surplus and earnings continued intact and exposed to the hazards of its business operations.

Aside from the book values as stated, whatever the trustees obtained on sale for the additional stock was the excess of the market values over such book values, and represented the proportional increase in value of the new and original stock, and was in no legal sense a part of the income. For this reason, market values ought to be given scant, if any, consideration in determining whether an

item should be deemed income, or a part of the estate, to be preserved for the remainderman. The stock market is proverbially unstable, about as variable as the tides, and, as remarked, in *Moss's Appeal*, *supra*, though well enough "where the parties are about to realize, but, upon a question of values between life tenants and remaindermen, a judicial decision should go down through the shifting sands of the stock market until it reaches the solid rock of actual values." Moreover, the market value may include the growth and increase of the corporate plant or business, and therefore include profits not to be classed as surplus or earnings. For these reasons, book, rather than market, values are of primary importance in solving problems like that involved in the case at bar.

The surplus, including the undistributed earnings, continued in the bank, notwithstanding the different increases of capital stock, and doubtless is there yet, if not lost. Of course, the stockholders were given the options, because of their interest in the capital, surplus, and undistributed earnings of the bank. They were then entitled to the proportional share of these upon dissolution of the corporation, or might have obtained that much upon the sale of existing stock. In granting the option, the corporation no more than protected this right in the outstanding stock without changing its character from capital to income. The option was of value, for the reason that it represented the privilege of buying shares at less than their value, but therein did not impair the income of the life tenant; for the latter became entitled to the dividends as on the new stock, if bought with funds of the estate, and, in any event, the income on the proceeds realized from the disposition of the option. True this involved a depreciation in the value of existing shares; but who shall say what part of the value of the option represented the growth of the business, its good will, and the like, and how such depreciation is to be distributed as between these and the accumulated sur-

plus? Can the option be said to represent the latter, when the bank has not undertaken in form nor in substance to distribute it to the shareholders? Shall there be an accounting in court between the remainderman and the life tenant every time the option to buy additional stock is given the trustees?

In *Holbrook v. Holbrook*, 74 N. H. 201 (66 Atl. 124, 12 L. R. A. (N. S.) 768), the difficulties in the way of treating such option or right to subscribe for additional stock as income are suggested; but, notwithstanding these, the court reached the conclusion that such options or rights, at least in part, should be so regarded. That decision is contrary to the great weight of authority, and, as we have attempted to show, is not sound in principle.

As observed in *Re Kernochan*, 104 N. Y. 618 (11 N. E. 149): "From the shares in question, no income could accrue, no profit arise, to the holder until ascertained and declared by the company and allotted to the shareholder, and that act should have been deemed to have been in the mind of the testator, and not the earnings or profits as ascertained by a third person, or a court, upon an investigation of the business and the affairs of the company, either upon an inspection of their books or otherwise."

The value of the right to subscribe necessarily depends upon the efficiency of the corporation's management, its location, its good will, and the like, and the right to subscribe for additional shares of stock, when given the stockholder, merely affords him the opportunity, because of owning the stock, of participating in a larger way in the capacity of the corporation to earn profits, and is to be regarded as an incident or an attribute appertaining to the stock. It follows that, though plaintiff was entitled to the income derived from the new stock, or from the profits derived from the sale thereof, the right to subscribe for additional shares formed no part of the income derived from the estate of the testator.—*Affirmed*.

**EVALINE RICHARDSON, JOHN W. KING, OLIVE J. FOSTER,  
ORVILLE J. KING, LULU MURPHEY, Appellants, v.  
LILLIA C. KING, Appellee.**

**Divorce: APPEARANCE: WAIVER OF DEFECTS IN NOTICE AND PETITION.**

1 Where the defendant appeared and filed answer in a divorce action, in which the parties were correctly named, a defect in the names of the parties in the original notice and petition was waived; and the final decree in which they were correctly named will be held to have been entered after the errors were corrected by amendment or otherwise, in support of the jurisdiction of the court. Besides the error in names in this instance was not such as to avoid a decree properly entered.

**Same: PLEADINGS: WAIVER OF DEFECTS.** The parties to a divorce suit

2 can not consent to a decree, or by agreement confer jurisdiction; but where the jurisdictional facts existed and the defendant appeared and joined issue on certain alleged grounds of divorce, without challenging the sufficiency of the petition in any respect, he will be held to have waived defects in the petition, the same as in other cases, in a collateral attack on the decree.

**Same: JURISDICTION: PRESUMPTION.** In support of a judgment of

3 divorce against a collateral attack, the appellate court will assume that the trial court found it had jurisdiction and that all matters necessary to that jurisdiction were established.

**Same: CANCELLATION OF DECREE: COLLATERAL ATTACK.** Courts are

4 slow to set aside a decree of divorce after a second marriage has taken place; and where third parties seek by collateral attack to avoid a decree which is fair on its face, for the purpose of rendering the second marriage illegal and thus depriving the surviving spouse of a share in the property of decedent, they must show that the former decree of divorce was absolutely void for want of jurisdiction.

**Same: PARTIES.** A resident defendant in a divorce action is a nec-

5 essary party to a suit to set the decree of divorce aside, whether the action is a direct or collateral attack upon the decree.

**Marriage: ACTION TO ANNUL.** Where an apparently valid decree

6 was granted the wife and she married another, a suit to annul the second marriage, on the ground that the decree of divorce was granted without jurisdiction, should be brought during the life of the second husband.

*Appeal from Fayette District Court.*—HON. L. E. FELLOWS, Judge.

FRIDAY, APRIL 5, 1912.

Suit in equity to set aside a decree of divorce secured by defendant against one Wyman Luther, and to determine the interests of the plaintiffs in some real estate in Buchanan County, Iowa. The trial court dismissed the petition, and plaintiffs appeal.—*Affirmed.*

*Loren Risk and Barr & Kenyon*, for appellants.

*J. R. Bane*, for appellee.

DEEMER, J.—Plaintiffs are the heirs at law of Chas. W. King, deceased, who died seised of the real estate in dispute. Defendant was married to Chas. W. King, and if she be his widow, she is entitled to share in his real estate. Plaintiffs claim that she is not his widow for the reason that, before marrying King, she had been married to Wyman Luther, from whom she was never legally divorced. It is admitted, however, that defendant brought an action for divorce against Luther, and that a decree was rendered granting the prayer of the petition; but it is contended that the decree is not binding because of defects in the proceedings, and that the court rendering it was without jurisdiction. The defects in the divorce proceedings, as shown by the record, are these:

I. The original notice of the divorce proceedings indicated that action was brought by Lillia Lothar v. William Lothar, and the petition filed named the plaintiff as Lillia Lather and the defendant as Wyman Lather. The testimony taken by a commissioner appointed by the court, defendant not appearing, was in an action entitled Lil-

1. Divorce:  
appearance:  
waiver of  
defects in  
notice and  
petition.

lia Luther v. Wyman Luther, and the final decree was entered in a case entitled in the same manner. Luther entered his appearance to the action, and in an answer entitled as in the case of Lillia Luther v. Wyman Luther, practically denied each and every allegation of the petition. Upon the testimony reported by the commissioner decree was duly entered of record on November 26, 1906, in a case properly entitled. The original notice was personally served upon Wyman Luther in the city of Oelwein in Fayette county, Iowa. The decree recites that defendant appeared by attorney at the hearing, and that, after hearing the evidence and the arguments of counsel, the court found: "That the parties were married near Arlington, Fayette county, Iowa, March 26, 1879; that since said marriage, about the year 1902, the defendant Wyman Luther wilfully deserted plaintiff, Lillia Luther, and has ever since absented himself without a reasonable cause for the period of over two years, and that plaintiff is entitled to a divorce from him." The decree itself was in the following language: "It is therefore considered by the court and ordered and adjudged and decreed that the plaintiff be divorced from the defendant, and that the bonds of matrimony existing between the plaintiff, Lillia Luther, and the defendant, Wyman Luther, be dissolved, and that the plaintiff have judgment against the defendant for costs of this action, hereby taxed at \$10.40, which costs are paid by the defendant." After entry of this decree, and on or about December 22, 1907, Lillia Luther was married to Chas. W. King. King died intestate March 27, 1910. The contention made by plaintiffs here is that, because of the mistake in the names of the parties as heretofore noted, the decree is invalid and the marriage to King illegal and void. The mistake, if any, in the notice, was cured by Luther's appearance, and, although the petition was entitled Lillia Lather v. Wyman Lather, the defendant therein appeared in his true name and filed an answer in

the case which was properly entitled. The testimony was taken in a case properly entitled, and the final decree correctly named the parties. As the final decree which properly named the parties recites that defendant appeared by attorney, the defects in the prior papers were waived and in order to support the jurisdiction it will be presumed, if that be necessary, that the errors in name were corrected by amendment or otherwise before final decree was entered.

Aside from this, we do not think the error in name sufficient to justify a court in ignoring a decree properly entered. See, as supporting this view, *Simons v. Marshall*, 3 G. Greene, 502; *Griffith v. Harvester Co.*, 92 Iowa, 634; *Loser v. Bank*, 149 Iowa, 672.

II. The only other point relied upon is the insufficiency of the petition upon which the divorce was granted. The sections of the Code material to this inquiry read as follows:

Except where the defendant is a resident of this state, served by personal service, the petition for divorce, in addition to the facts on account of which the plaintiff claims the relief sought, must state that the plaintiff has been for the last year a resident of the state, specifying the township and county in which he or she has resided, and the length of such residence therein after deducting all absences from the state; that it has been in good faith and not for the purpose of obtaining a divorce only; and in all cases it must be alleged that the application is made in good faith and for the purpose set forth in the petition. (Code, section 3172).

The petition must be verified by the plaintiff and its allegations established by competent evidence. If the averments as to residence are not fully proved, the hearing shall proceed no further, and the action be dismissed by the court; and no divorce shall be granted on the testimony of the plaintiff alone. All such actions shall be heard in open court upon the oral testimony of witnesses, or depositions taken as in other equitable actions or by a commissioner appointed by the court. (Code, section 3173).



The petition filed in the divorce case, so far as material, reads as follows:

Par. 1. Plaintiff alleges that on the 26th day of March, 1879, the plaintiff and defendant were married near Arlington, Fayette county, Iowa, and have ever since been and now are husband and wife. Par. 2. That the parties have lived in Fayette county, Iowa, most of their lives since said marriage except when defendant was absent in Dakota. That both parties are now in said Fayette county, Iowa. . . . Par. 4. That the defendant, disregarding his marriage vows, did about the year 1902 wilfully desert the plaintiff and absent himself without a reasonable cause for the space of over two years and has failed and refused to support her. Par. 5. Plaintiff further alleges that, since and after said marriage, the defendant became addicted to habitual drunkenness and neglected his family. Par. 6. That the plaintiff has no property of her own and has to rely upon her labor for her support.

It will be noticed that the residence of each of the parties is imperfectly stated, and there is no allegation that "the application was made in good faith and for the purpose set forth in the petition." Defendant was personally served with notice of the action in Fayette county, and he appeared and filed answer; his answer admitting all the allegations of the petition except those contained in paragraphs 4, 5, and 6. The testimony adduced before the commissioner, which was reported to the court, showed the following:

a. SAME:  
pleadings:  
waiver of  
defects.

Mrs. Luther testified:

My name is Lillia Luther, aged 42; reside in Putnam township, Fayette county, Iowa. I was married to the defendant March 26, 1879, near Arlington, Fayette county, Iowa. We have lived in Fayette county most of the time ever since with some few exceptions. . . . He (defendant) never owned a farm, never accumulated any property, and we drifted from place to place until about the spring of 1904, when we were living about 1½ miles from Oelwein, Iowa. . . . I am now working

for a farmer and family, caring for their house, on a farm in Putnam township, Fayette county, Iowa, and have been there since March, 1906.

Another witness testified: "I have known plaintiff quite intimately since March, 1904, and know of my own personal knowledge that she has kept house and worked by the week for other parties for her support and maintenance."

And still another, a daughter of the parties:

About the time the defendant left my mother for good, he came home on one occasion intoxicated and said he wouldn't sleep in the house because mama was there. At that time my husband and I were working for the owner of this farm on which we now reside. That prior to this time my father and mother had been working on this farm for the owner, but on account of the defendant's indolence and negligence the owner of the farm wouldn't let him have it any longer. During the winter of 1903 and 1904, my mother was with me and my father, the defendant, also. I heard the defendant just prior to the time he left frequently swear at my mother. . . . The defendant did leave my mother early in March, 1904, without any cause on her part, and has absented himself ever since. That since that time my mother has been obliged to work out by the week and support and provide for herself. That I know she has done this of my own personal knowledge, and I know that my father has refused to live with her and has not lived or cohabited with her since that, early in March, 1904. My mother has always had the care of the family upon her. She has been kind and attentive to the children. She has been economical and industrious and never gave my father any cause for leaving. She is now working for a farmer and his family. I think it is in Putnam township, Fayette county, Iowa.

Upon the trial of the instant case in January, 1911, plaintiff in the divorce case, defendant here, testified:

Q. State when and where you were married to Wyman Luther? A. Well, near Arlington, Iowa. Q. What county?

A. Fayette county, the 26th day of March. Q. When? A. 1879. Q. Where did you reside immediately after your marriage in 1879, you and your husband at that time? A. In Fayette county, near Aurora. There wasn't any Aurora there then. There wasn't any town there then. Q. State when it was you worked for John Spinley? A. Well, we worked for him the spring we were married. Q. Where did you reside at that time, township, county, and state? A. Fayette county. Q. You may state in what counties and states you and your husband resided in since your marriage and up to the time the decree of divorce was obtained? A. Never out of the two counties myself, and never while we were married was he out of the two counties I know of. We lived mostly in Fayette county. Q. What do you mean by the 'two counties?' A. Buchanan just adjoining, just south of Fayette county. Q. About how many years after your marriage did you reside in Buchanan county? A. Well, let me see; well, the following season, I believe in the following season, in May, the same spring, we went onto a farm just over the line in Buchanan county. Q. About how long did you reside, you and your husband, at that time in Buchanan county? A. Well, we seldom was out of the county. About a year and a half or two years, somewhere inside of two years, we lived I guess. Q. About how many years since you first resided in Buchanan county? A. Well, I don't know as I could tell exactly how long it has been; it has been quite a while. Q. About ten years? A. Oh, it has been all of that. Q. Been twelve years? A. Yes, it has been all of twelve years. Q. Wasn't it along some time about 1887 or 1888 that you resided in Buchanan county, Iowa? A. Well, let me see. I had some of those dates, but I can't call them to memory. Q. After removing from Buchanan county, to what county did you remove to, and where did you reside? A. Why, back to Fayette county. Q. Fayette county, Iowa? A. Fayette county, Iowa. Q. Have you and your husband since your marriage and up to the time the decree of divorce was obtained in November, 1906, ever resided outside of either Buchanan or Fayette counties, state of Iowa? A. No, sir. Q. State whether or not about the year 1902 you and your husband worked and resided on what is called the Mason and Brown farm near Oelwein, Fayette County, Iowa?

A. Yes, sir; we resided there. Q. State whether or not from that time, and up until the time the decree of divorce was obtained, you and your husband resided anywhere else than in Fayette county, Iowa? A. No, sir. Q. At the time you filed the petition for divorce in August, 1906, in what township, county, and state were you living in? A. Living in Fayette county, Putnam township, state of Iowa. Q. You may state in what county the defendant, Wyman Luther, resided at that time? A. He was living in Fayette county. Q. Go on, what state? A. State of Iowa. Q. Now, you may state whether or not the residence in Fayette county, state of Iowa, at the time you filed the petition for divorce, on your part was in good faith and not for the purpose of obtaining divorce only. A. Yes, sir. Q. You may state whether or not the application for the divorce of 1906 was made in good faith and for the purpose set forth in the petition in the case. A. Yes, sir. Q. What was the correct way of spelling this name before the divorce was obtained? A. L-u-t-h-e-r. Q. Then at no time since you marriage in 1879 and up until November, 1906, did either you or your husband, Wyman Luther, reside out of either Fayette county or Buchanan county, state of Iowa? A. No, sir. Q. State whether or not since your marriage to Wyman Luther in 1879, and up until November, 1906, either you or he ever resided out of either Fayette county or Buchanan county, Iowa. A. No, sir. Q. Did you, or did you not, reside out of those counties? A. We did not. I don't think. Q. In your petition in the original divorce case you stated your husband had been absent in Dakota. Did your husband ever reside in Dakota after you were married, or was that before? A. Well, if he has been in Dakota, he wasn't there very long. Q. Do you know he resided in Dakota at any time after your marriage to him; that is, I mean, Wyman Luther? A. I didn't know he was ever in Dakota. Q. You swore to it in your petition did you not? A. I don't think so. . . . Q. If your husband was ever in Dakota, you had no knowledge of it? A. No, sir. Q. Did you ever have any knowledge of it? A. Well, as I said a short time ago, just a few days ago I was talking with a friend of mine, and he said he thought he had been in Dakota a short time. Q. That is, a friend told you that? A. Yes, sir. Q. Recently? A. Yes, sir.

Q. Within the last month?    A. Within the last few days.

Q. Was that the first knowledge you ever had of your husband being out of the state, had been in Dakota?    A. Yes, sir.

Other witnesses also confirmed this testimony as to the residence of the parties to the divorce proceeding, and it was agreed at the time of the trial in the present case that defendant Luther was then living in Jackson township, Fayette county. While most of this testimony was objected to, it was doubtless admissible to show that the court had jurisdiction of the divorce proceedings in fact, or, to speak with more accuracy, that jurisdictional facts existed when the divorce proceedings were instituted and the decree rendered. There is no claim of fraud or collusion, and the sole question in this connection is the claim that, by reason of the defects in the petition, the court was without jurisdiction. Had the notice to the defendant of the divorce proceeding been constructive only, had he been a nonresident of the state, and had he not entered an appearance in the suit, doubtless plaintiff's contention in this regard should prevail; but the defendant was a resident of the county and state, was personally served with notice in the county of his residence, and appeared and filed answer to the suit. He did not challenge the sufficiency of the petition in any respect, but took issue with the plaintiff in the action upon certain of the grounds alleged for granting the divorce. Now, while it is true that the parties to a divorce case can not consent either to a divorce or to a decree, yet a defendant to such a suit may waive certain defects in the petition just as in any other case, provided this waiver is not fraudulent or collusive. Of course, the parties can not by agreement confer jurisdiction, if the jurisdictional facts do not exist. But if they in fact exist, and the petition filed is not challenged, it will be held sufficient where the defendant appears and by answer waives the defects in the pleading. See *In re*

*James' Estate*, 99 Cal. 374 (33 Pac. 1122, 37 Am. St. Rep. 60); *Hunt v. Hunt*, 72 N. Y. 217 (28 Am. Rep. 129); *Ayres v. Harshman et al.*, 66 Ind. 291; *McFarlane v. Cornelius*, 43 Or. 513 (73 Pac. 325, 74 Pac. 468); *Finch v. Frymise* (Tenn. Ch. App.) 36 S. W. 883; *Rush v. Rush*, 46 Iowa, 648; *Hake v. Fink*, 9 Watts (Pa.) 336; *Ruger v. Heckel*, 85 N. Y. 483; *Kinnier v. Kinnier*, 45 N. Y. 535 (6 Am. Rep. 132).

In the case last cited it is said:

Having jurisdiction of the subject-matter and of the parties, the other questions relating to the pleadings and the form and manner of procedure were matters of regularity merely, for which the judgment can not be questioned collaterally. In *Shottenkirk v. Wheeler*, 3 Johns. Ch. (N. Y.) 276, the court said: 'There is no case in which equity has ever undertaken to question a judgment for irregularity.' . . . Viewing them in the most favorable light for the plaintiff, the question is presented whether the Illinois decree can be attacked in this state in a collateral action because the plaintiff in that action was not actually a *bona fide* resident of that state at the time. I think not. It is conceded he was there, appeared in that court, filed his bill, and took the decree. The question whether he was a resident there, so as to enable him to file his bill, was for that court to determine, and although it may have decided erroneously, the decision can not affect the validity of the judgment. The status of all persons within a state is exclusively for that state to determine for itself. . . . A wrong decision does not impair the power to decide, or the validity of the decision when questioned collaterally. . . . This decree was binding upon the parties to it, within this rule. No fraud is alleged by either against the other, and neither could assert that it was not a valid judgment, as they were both equally guilty of the fraud. Bishop, Marriage, 706. It effectually divorced the parties to it, and their marriage was no longer in force in any legal sense. The plaintiff in this action has not been defrauded, nor is he injured by it. The plaintiff was entitled to marry a marriageable person, and though she may not have been, in other respects, all he

anticipated or all that was desirable, yet she was competent to marry, because her former marriage was not then in force, and, being competent, it is of no legal consequence to the plaintiff how she became so. Conceding fraud as alleged, he can not avail himself of it. His success in this case would have no effect upon the status of the former husband, while the position of the defendant would be anomalous. By the judgment in this action, she would be declared the wife of her former husband, and by the judgment of another court, equally binding upon her, she would be declared not to be his wife. She could not claim marital rights from either husband, and it would be at least hazardous to marry another. . . . Nor can I assent to the reason given for allowing the husband to repudiate the binding force of the judgment upon him, after voluntarily submitting himself to the jurisdiction of the court, and litigating the case upon its merits. As to him, the questions litigated were *res adjudicata*.

In the *McFarlane* case, *supra*, the court said:

It is also contended by plaintiff's counsel that the complaint in the divorce suit did not state facts sufficient to authorize a decree dissolving the marriage contract, and for this reason no error was committed in rejecting the judgment roll therein. In the trial of that suit the court necessarily determined that the complaint was sufficient, and, there having been some facts alleged upon which this conclusion was based, the decree is not void, and hence not vulnerable to collateral attack. *Woodward v. Baker*, 10 Or. 491; *Berry v. King*, 15 Or. 165 (13 Pac. 772); *Morrill v. Morrill*, 20 Or. 96 (25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95); *Crabill v. Crabill*, 22 Or. 588 (30 Pac. 320); *Bank of Colfax v. Richardson*, 34 Or. 518 (54 Pac. 359, 75 Am. St. Rep. 664); *Altman v. School District*, 35 Or. 85 (56 Pac. 291, 76 Am. St. Rep. 468); *McNary v. Bush*, 35 Or. 114 (56 Pac. 646); *George v. Nowlan*, 38 Or. 537 (64 Pac. 1). See, also, *Mengel v. Mengel*, 145 Iowa, 737, which is clearly in point.)

That this proceeding is a collateral attack upon a divorce decree must ever be kept in mind, for the rules we have in mind and are announcing have reference only to



such an attack. The defendant appeared to the divorce case and filed an answer, and he could have challenged the sufficiency of the petition, but did not do so. Had he demurred, doubtless his demurrer would have been sustained, and in that event plaintiff could have amended. As he did not demur, he waived the defect in the pleading. The court had jurisdiction of the general subject and of the parties, and the facts shown demonstrate that the court also had jurisdiction of the particular case.

In support of the judgment against a collateral attack, we must assume that the trial court found that it had jurisdiction, and that all the matters necessary to that jurisdiction were established. Had the defendant

3. SAME: jurisdiction: presumption. to the divorce action appealed, an entirely different case would be presented. Upon such an appeal the rule in *Pinkney v. Pinkney*, 4 G. Greene, 324, would apply. But he did not appeal, and although alive and a resident of the county where this action was brought, he was not made a party to the instant suit.

Plaintiffs herein are in no position to insist upon a new trial of the divorce proceeding. They are neither parties nor privies thereto. They claim nothing through either of the parties to the divorce proceeding, and are not asking a new trial of that action. They are seeking to avoid a decree of divorce in order to make the marriage of their deceased father unlawful, and thus deprive the defendant, to whom their father was married, of any share of his estate. In order to do this, they must show that the divorce decree, which is fair on its face, was and is absolutely void because the court which granted it had no jurisdiction. This we think they have not done. Courts very properly manifest great reluctance in setting aside decrees of the divorce after a second marriage has taken place, and will not do so save upon the most satisfactory showing. A verified petition is

4. SAME: cancellation of decree: collateral attack.



required by section 3173 of the Code but the universal holding is that this requirement is not jurisdictional. See *McCraney v. McCraney*, 5 Iowa, 232-254; *Ellis v. White*, 61 Iowa, 644; *Van Duzer v. Van Duzer*, 65 Iowa, 625; *Cooper v. Sunderland*, 3 Iowa, 114.

Without quoting from these cases, it is sufficient to say that the principles announced therein are applicable here, and, followed to their logical conclusion, must result in an affirmance of the judgment. Enough has been said to justify the conclusion of the trial court. However, there are other facts which in themselves are sufficient to defeat the plaintiff's action.

The defendant in the divorce suit, although a resident of the county where this present suit was commenced, was not made a party to the proceedings. He is vitally interested in the suit, and, if this be a direct attack upon the decree of divorce, he was not only a necessary, but an indispensable party. See section 4091 *et seq.* of the Code; *Day v. Goodwin*, 104 Iowa, 374. Even if the attack be regarded as collateral, we think he should have been made a party. He is entitled to know whether he is the lawful husband of the defendant; for he can not be her husband for some purposes, and a divorced spouse for all others. *Fulliam v. Drake*, 105 Iowa, 615.

It may be that, if the decree were absolutely void upon its face, he would not be a necessary party. But the decree is fair on its face and the same presumptions attend it as if the action were an ordinary one before a court of general jurisdiction. When a collateral attack is made upon it and proof *aliunde* is required, we think the better rule is that he should be made a party.

Again, the defendant was married to King at the time of his death, and no effort was made to set aside or annul the marriage until after his death; and this attempt was by a purely collateral proceeding. In many cases it has

been held that neither a suit for divorce nor to annul marriage will lie after the death of one of the parties. See *Richardson v. Stowe*, 102 Mo. 33 (14 S. W. 810); *Barney v. Barney*, 14 Iowa, 189; *Rawson v. Rawson*, 156 Mass. 578 (31 N. E. 653); *Parker's Appeal*, 44 Pa. 309; *Kirschner v. Dietrich*, 110 Cal. 502 (42 Pac. 1064); *Zoellner v. Zoellner*, 46 Mich. 511 (9 N. W. 831); *Roberts v. Roberts*, 19 R. I. 349 (33 Atl. 872).

Of course, if the marriage to King were absolutely void because defendant had a husband then living from whom she had not been divorced, no decree of annulment was necessary. But this is not the fact here. There was an apparently valid decree of divorce of record when defendant married King, and this, as we have seen, was not subject to collateral attack, unless absolutely void. It was not void, but voidable, and we think a nullity suit should have been commenced before the death of King.

On the whole record, we think that the decree of the district court should be and it is,—*Affirmed*.

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FRANK L. LANG, et al., v. JOHN LANG, Appellant.

**Insanity: DELUSIONS: EVIDENCE.** An insane delusion is a belief in something impossible in the nature of things, or the circumstances surrounding the afflicted person, and which refuses to yield to evidence or reason. And where such belief, owing to its character, is probably unfounded yet might be true, its truth will not be assumed in the absence of evidence. Thus evidence in a guardianship proceeding that defendant's former wife was industrious, and that his children were obedient, was admissible to show that his belief in a conspiracy between them to obtain his property was a delusion; but evidence of that character which was merely the expression of an opinion is not admissible, and a comparison of the conduct of his children with those of his neighbor's was immaterial.

**Same.** In a proceeding to appoint a guardian for the father of peti-

2 tioners and to set aside conveyances to his second wife, made as part of a contract with her for support during life, on the ground of mental incapacity, evidence of his first wife's devotion, the custom and habits of his children, and that he was profane and applied vile epithets to his former wife and children, was admissible for the purpose of refuting his belief of a conspiracy on their part to deprive him of his property, but not as direct evidence of mental unsoundness.

**Same.** The record in this case is held to contain sufficient evidence  
3 to indicate that defendant's belief that his first wife and children conspired to rob him of his property was a delusion.

**Same.** A copy of an account rendered by a son who managed his  
4 father's farm, showing the sale of stock from the farm, was the best evidence available on the subject, and admissible to refute the father's belief that he was being robbed by his family.

**Same.** Evidence that defendant's second wife was guilty of lascivious  
5 conduct, not shown to have been known to defendant, or that a suit had been instituted against her for alienation of affection by the wife another, was immaterial to any issue in this case; but defendant's testimony that he had no knowledge of facts derogatory of her morals prior to their marriage was competent, as tending to rebut any inference which might have been drawn from a knowledge of her character.

**Evidence: NONEXPERTS: SCOPE OF CROSS-EXAMINATION.** A nonexpert  
6 witness is permitted in the first instance to give his opinion of the sanity of a person, only after detailing the facts within his personal observation upon which the opinion is based; and he is not subject to cross-examination by a series of hypothetical questions involving practically every phase of the case.

**Insanity: EVIDENCE.** One entertaining the suspicion that his wife  
7 and children were seeking to deprive him of his property should be permitted to show that they consulted a lawyer regarding a settlement or division of the property, when charged with an insane delusion in that regard as ground for the appointment of a guardian.

**Same.** That one for whom it was sought to have a guardian ap-  
8 pointed on the ground of insanity, because having conveyed his property to his second wife, bought and sold real property of large value without making an examination of it, was admissible on the issue of his mental condition.

**Same: EXAMINATION OF ONE CHARGED WITH INSANITY.** Great latitude  
9 should be allowed in the examination of one for whom it is

sought to have a guardian appointed on the ground of insanity. His recollection and understanding of business transactions; his manner of speech, memory, and the state of his health; his ability to comprehend what he had done and was about to do; the accuracy of his judgment, and generally all matters calculated to aid the jury in determining his condition of mind, are proper subjects of inquiry.

**Expert evidence:** WEIGHT: DETERMINATION. It is the province of  
10 the jury to determine the relative value of the opinions of all witnesses, including experts.

**Guardianship:** INSANE PERSONS. One who is not possessed of sufficient  
11 mental capacity to preserve his property, but is subject to the will of others in the disposition of the same, should have a guardian appointed for him. The fact that he may become subject to the will of others at some future time is not sufficient ground for the appointment however.

*Appeal from Crawford District Court.*—HON. F. M. POWERS, Judge.

TUESDAY, APRIL 9, 1912.

On petition of plaintiffs, a temporary guardian of the property of John R. Lang was appointed, and on trial the jury found that a permanent guardian should be appointed to manage his property and affairs. He appeals.  
—*Reversed.*

*B. I. Salinger and L. H. Salinger, for appellant.*

*Conner & Lally, for appellees.*

LADD, J.—The plaintiffs are the sons and daughter of the defendant. Another son, Harry Lang, did not join in the petition, and a daughter Hattie had died of tuberculosis. Their mother died January 21, 1908, and her surviving husband, the defendant, then sixty-two or sixty-seven years of age, married Leonora Regan, then twenty-one years of age and a sister of the wife of his son Thomas, April 17th

of the same year. Immediately after this marriage, he conveyed to her the one hundred and sixty acres of land on which he lived, and on July 25th of the same year signed and acknowledged a deed, purporting to convey to her the remainder of his land, or six hundred and eighty acres, and entered into a contract with her, which recited that he was doing so in order to provide himself a home and care in his declining years, and that his wife was about to abandon her home because of his intemperate habits, but desired to care for and wait on him if he reformed, and stipulated (1) that he would quit and forever abstain from the use of all intoxicating liquors as a beverage; (2) that he would not illtreat his wife, so as to endanger her health or life; (3) that he executes to her a deed of all his real estate in Crawford county, Iowa, intending thereby that no present title or estate shall pass to said wife until his death, and gives her all personal property owned by him at the time of his death, subject to the conditions:

(5) The said party of the second part, in consideration of the above agreement, hereby agrees to and does return to her said husband, and agrees to remain with him and to care for him as his wife until his death, except in case the said party of the first part shall break his said promise and again become addicted to the use of intoxicating liquors, or in case he shall abuse his said wife, so as to endanger her health or life; in either of which events, the said party of the second part may abandon her said husband and be excused from further living with or caring for her said husband. (6) It is also understood and agreed by the parties hereto that, in case the said party of the first part shall keep his said agreement in relation to abstaining from the use of intoxicating liquors as a beverage, and in case he shall keep his said agreement in relation to conducting himself towards his wife, so as not to illtreat her in such a manner as to endanger her health or life, and, notwithstanding the keeping of the said agreements by the said party of the first part, his said wife shall voluntarily forsake her said husband and refuse to live and to care for him until his death as his wife, then, and in that event,

she forfeits all claim to the real and personal property mentioned and referred to in this agreement which was to be conveyed and given to her by her said husband, and said party of the second part, in such event, would take only such property out of her husband's estate as is allowed to her by law. In event of her death during his life, the deed was to be a nullity, and no title to pass at his death.

The petition was filed September 28, 1908, and the appointment of a temporary guardian for the management of his property requested, with the prayer that a permanent guardian may be designated for that purpose, and also to take such steps as may be essential, in order to restore to his estate the title or right to claim any of his property acquired by his wife since their marriage. The grounds on which such action is sought are that (1) he has become a spendthrift, (2) has become addicted to the excessive use of intoxicating liquors to such an extent as to render him incapable of managing his business affairs, and (3) his mind is unsound.

Only the last ground was submitted to the jury, and appellant contends that this was error, in that the evidence was such that a verdict should have been directed for defendant. A detailed review of the evidence contained in an abstract of over 400 pages is impractical and would serve no useful purpose. It is enough to say that for more than twenty-five years prior to July 25, 1908, the defendant had used intoxicating liquors excessively, frequently becoming intoxicated, and evidence was adduced tending to prove numerous incidents and circumstances in their nature so unusual or unnatural as that they tended to indicate a disordered or diseased intellect; and nonexperts, basing their conclusions on these, expressed the opinion that he was of unsound mind, as did two experts. On the other hand, numerous nonexperts were of opinion that his mind was sound, as were two experts. We have thoroughly examined the record, and are content with the ruling that the evidence was

such as to carry the issue as to whether defendant was of sound mind to the jury.

I. The evidence tended to show that defendant believed, and had done so for some time, that his children were at enmity with him; that they and his first wife had conspired together to divest him of his property;

x. INSANITY:  
delusions:  
evidence:

and that they had been idlers, and had never worked as they should in performing their duties about the farm. To prove these were delusions, evidence was adduced, over objection, tending to prove, in substance, that his children had been obedient to their father, and had always done what he had required of them, and also the labors performed by their mother to his knowledge. As contended by appellant, though not in this connection, it was essential, in order to prove his beliefs were delusions, to show that they were unfounded, and such was the purpose of this testimony.

A delusion, such as indicative of an unsound mind, is a belief in something impossible in the nature of things, or impossible in the circumstances surrounding the afflicted individual under investigation, and which refuses to yield to evidence or to reason. *Scott v. Scott*, 212 Ill. 597 (72 N. E. 708). It is defined in *Potter v. Jonas*, 20 Or. 239 (25 Pac. 769, 12 L. R. A. 161), as "a conception that originated spontaneously in the mind without evidence of any kind to support it, which can be accounted for on no reasonable hypothesis, having no foundation in reality, and springing from a diseased and morbid condition of the mind." "A delusion is not necessarily a belief in something impossible in the nature of things or the circumstances of the case; but if the belief is entertained against all evidence and probability, and after argument to the contrary, it affords grounds for inferring that the person labors under an insane delusion." *Medill v. Snyder*, 61 Kan. 15 (58 Pac. 962, 78 Am. St. Rep. 307).

The belief entertained by defendant, though, owing

to its character, likely unfounded, might be true; but this was not to be assumed, in the absence of evidence so showing. *Drum v. Capps*, 240 Ill. 524 (88 N. E. 1025); *In re McGovran's Estate*, 185 Pa. 203 (39 Atl. 816). If the belief is well founded, or the individual under investigation has reasonable grounds for entertaining it, then, of course, it is not to be regarded as a delusion. *Bradley v. Palmer*, 193 Ill. 15 (61 N. E. 856); *Skinner v. Lewis*, 40 Or. 571, (62 Pac. 523, 67 Pac. 951).

The evidence was admissible as tending to show that defendant's belief was unfounded. In so holding, we are not to be understood to approve of all the rulings on the admissibility of this class of evidence. For instance, it was incompetent to permit a witness to express his opinion generally that the sons were "good boys," or that they did not shirk, or that they were "hard workers," and the like. These were mere conclusions. The witnesses should have been required to state what they had observed, and allow the jury to determine whether they would infer as much. And it was not material how they compared with neighbors' children, as was sought to be shown in cross-examination. They were not on trial and the evidence was merely for the purpose of showing whether there was any foundation for defendant's belief of what they were and had been. The evidence might well have been carefully restricted to the refutation of defendant's beliefs.

Proof of his first wife's devotion and sacrifices was only material for this purpose; and the circumstances that she and the children dressed with extreme plainness, and

2. SAME. did not attend church, and the latter had little schooling, could not well be construed into evidence of defendant's mental unsoundness. He may have misconceived his obligations to his family, and have disregarded many of the amenities which render life worth living; but this is not so unusual as that proof thereof should be regarded as indicative of insanity. It shows



rather that he was stingy and mean, and the evidence should have been excluded, save wherein his conduct or what he may have said was involved. The theory of the plaintiff was that, through the continual use of intoxicants and unrestrained passion, his mind had gradually weakened until he had become incapable of caring for his financial affairs, and, of course, as bearing thereon, what he had done and said for many years was pertinent to the issue. On this ground, evidence that he had habitually cursed his wife and children during many years, and applied to them vile epithets, and questioned the chastity of his daughters when but eleven or twelve years of age, was admissible. As argued, a person may employ the language he indulged in, or consume the intoxicants he was shown to have disposed of, without being of unsound mind; but this does not obviate the probative value of such evidence, when considered in connection with other circumstances indicative of a weakened or diseased intellect. Generally the class of testimony to which objection was interposed was admissible.

II. The defendant was shown to have entertained the belief that his first wife stole from him and gave to the children, and that they conspired together with the design of divesting him of his property, and that  
3. SAME. his children were "robbers." It is argued that there was no evidence to refute the truth of such belief; and therefore it could not be regarded as a delusion. Were the premises correct, there would be no difficulty about the conclusion; but we think there was ample evidence in the record to indicate that his conviction on these matters was without foundation.

III. Thomas Lang operated defendant's farm two years on shares, and one of the grounds for thinking him a "robber" was, as defendant testified, that his son had appropriated the proceeds of cattle and hogs  
4. SAME. sold, without paying him his share. The son swore he had furnished defendant a statement, to which he

made no objection, and kept a copy of it himself. Defendant denied having received any such paper, and the copy was introduced in evidence. It was the best evidence available of what the son claimed to have furnished his father, and was admissible as bearing on the issue of whether defendant's belief was unfounded.

IV. Evidence was received tending to prove that defendant's present wife occupied a room at a hotel in Sioux City overnight with a man named Burnett in June, 1908;

5. SAME. that she had danced in the bowery with one

- Butler, who had formerly fought over her with Burnett at defendant's house shortly before he had married her; and that she was seen in a buggy with one Lockmiller at a late hour in the evening in Dennison. All this evidence should have been excluded. None of the incidents were shown to have been known to defendant; and that his wife may have been lascivious had no bearing on the issue being tried.

V. In the opening statement, counsel for plaintiff said to the jury that a suit had been started in the district court of Crawford county against defendant's wife by Mrs. Burnett for the alienation of her husband's affections. This was objected to, and the objection overruled, on the theory that such evidence would tend to show Mrs. Lang disreputable, and that she had such an influence over Lang as to take away his property. Of course, the bringing of such suit would not be competent to prove anything of the kind, and the facts recited, in no event, could have had any bearing on the issues being tried.

There was evidence tending to prove his present wife to have been of loose morals prior to her marriage, and that defendant, in marrying her, must have known this. He testified he never heard anything against her, and this was stricken on motion. The ruling was erroneous; for his answer tended to rebut any inference which might otherwise have been drawn, had he knowledge of what she was.

Wilbur Hall, a farmer, was called by defendant and testified to having known defendant twenty-eight years; that he had lived about one and one-half miles from him, and had frequently conversed with him; and that, in his opinion, he was of sound mind.

6. EVIDENCE:  
nonexperts:  
scope of cross-  
examination.

On cross-examination, after eliciting the statement that defendant had been drunk about once every two weeks during this time, counsel for plaintiffs propounded a series of hypothetical questions covering nearly every phase of the case, and, over objection, the witness was allowed to answer whether he would regard the matters recited as evidence, or indicative, of insanity. John Deitz, Peter Schau, E. H. Weed, and others also testified, after reciting matters within their observation, to their opinion as to whether the defendant was of unsound mind, and were cross-examined at great length as to what would be or have been their opinion on hypothetical statements of facts recited as indicative of insanity or unsoundness of mind. These suppositious facts were those of which evidence had been adduced, and which were claimed to have a tendency to prove unsoundness of defendant's mind. The opinions of nonexperts in such cases are limited to facts and reasons derived from actual observation, and are only admissible because the courts recognize the difficulty experienced by witnesses in describing to the jury all the conditions and appearances which enter into opinions they express. Many of the earlier decisions excluded them entirely, and this is still the rule in some jurisdictions. Such evidence is admissible in this state, and the rule prevails here, as elsewhere, that on a cross-examination the value of such opinions may not be tested by propounding hypothetical questions; nor may these be submitted to such witnesses on direct examination. *Hogmire's Appeal*, 108 Mich. 410 (66 N. W. 327); *Dunham's Appeal*, 27 Conn. 192; *Ragland v. State*, 125 Ala. 12 (27 South. 983); *Appleby v. Brock*, 76 Mo. 314; *Bell v. McMaster*, 29 Hun (N. Y.)

272; *St. Louis Mut. Life Ins. Co. v. Graves*, 6 Bush (Ky.) 268; *In re Dolbeer's Estate*, 149 Cal. — (86 Pac. 695, 9 Ann. Cas. 795); *Rambler v. Tryon*, 7 Serg. & R. (Pa.) 90 (10 Am. Dec. 444).

In the last case, such questions were declared to be ensnaring, to which the witnesses themselves might object, because calling for opinions, not based on their own knowledge and observation, but on that of others, and it was said that:

The witnesses had already given the opinion and the facts on which they founded it, and the jury were to judge of the correctness of any opinion from the facts and reasons stated by the witnesses. And the witnesses' opinion of the capacity of a man must not be founded on the hearsay of others, or the oath of others. As well might the defendants in error have called for the opinion of any bystander who had heard the evidence given by them of the state of the man's mind. . . . To give such latitude as was allowed in this case to a cross-examination would be trying the case, not by the evidence of facts and opinion formed by witnesses from their own observation and knowledge, but would be trying it on opinions founded on hearsay and facts stated by others, unknown to the witnesses, and altogether inconsistent with their knowledge and with the knowledge to which they had testified.

*In re Dolbeer's Estate, supra*, the court said that "hypothetical questions involving facts not testified to by the witnesses themselves were put by contestant to certain nonexpert witnesses familiar with the deceased, and by the court were ruled out. These rulings were proper. No case has been cited which allows such a line of inquiry, even upon cross-examination, and as to the impropriety of such questions reference may be made to" the cases above cited. The rulings by which hypothetical questions were permitted to be propounded to nonexpert witnesses were erroneous; and as in such questions the matters claimed to be indicative of soundness were repeated over and over

again, and as the inquiries had a tendency to ensnare the witnesses and discredit the opinions they had expressed, these rulings were extremely prejudicial.

Frank Lang, when on the witness stand, was asked whether he did not remember that two or three years before the death of his mother he and she entered Harding's office to consult in regard to a settlement or division of the defendant's property. The objection was sustained. This was erroneous. The defendant was shown to have entertained a suspicion that his wife and children were conspiring against him with the purpose of divesting him of his property. An answer to this in the affirmative would have tended to justify such suspicion, and to have obviated the inference, otherwise to be drawn, that his belief was an insane delusion.

On June 20, 1908, on the solicitation of G. B. Goin, he bought 240 acres of land without examining it, though he knew its condition in a general way, as it was but three miles from his own farm, for \$11,000, on agreement that they should share profits equally. He paid \$1,000 down, and shortly afterwards the land was disposed of at an advance of \$1,550. In August of the same year, he bought a section of land in Monona county under the same arrangement, except that he was to have 6 percent per annum on the money invested and share equally with Goin the profits above that. He paid \$1,000 down, and undertook in the purchase contract to pay \$29,440 on the first of the following March. He did not examine this land, though he may have passed over it many years previous. In connection with this evidence, it was made to appear that, prior to the death of his first wife, he had been accustomed to examine everything cautiously before purchasing, and had acted solely on his own judgment. The evidence was competent and rightly considered a circumstance bearing on the issue to be determined. Evidence that others may have been accustomed to seek for or act

7. INSANITY:  
evidence.

8. SAME.

on the advice of bankers, as was sought to be shown by appellant, was rightly rejected; the change in method pursued by him only being relevant, and the extent of the obligation in consequence.

Counsel for defendant was unduly restricted in his examination. As the issue was the condition of his own mind, great latitude should have been given, and counsel permitted to ask questions calculated to test his mental capacity. In examining him concerning the making of the papers on July 25, 1908, on objection, the court limited him to reciting what was said, and excluded all expressions of opinion. Thus he was asked: "What is the fact of your understanding of these papers that night? Did you or did you not, understand that you had given your wife anything by these papers?" This was objected to as incompetent, irrelevant, and because the papers expressed the intent. The objection was sustained. The ruling might well have been the other way. It was competent to test the defendant as to the correctness of his opinions and of his power to reason. Again, he testified that he had been in jail at Charter Oak for drunkenness twice, and was asked: "Just tell about your appealing; what you remember about having appealed from that decision." An objection that the record was the best evidence was sustained and adhered to, upon explanation by his counsel that this was not testimonial evidence, but to illustrate the condition of defendant's mind. Again he was asked, "How frequently have you been so intoxicated as to disable you from business?" An objection that this was incompetent was sustained. We think an answer should have been allowed. Again, he was asked, "What was your purpose, regarding the use of intoxicating liquors, at the time you signed the contract?" An objection that the contract expressed the purpose was sustained. The objection should have been overruled. He was asked whether he still had an inclination to use intoxicating liq-

9. SAME: examination of one charged with insanity.

nors, and whether he thought himself able to refrain therefrom, but objections thereto were sustained, and he was not permitted to state what had brought about a change in his life in quitting the drink habit, nor to state how this had affected his business interests, nor to state how much time he had been disabled by sickness in the past from doing work; and his statement, in answer to question, that he had been careful and had done the best he could in caring for his money was stricken out. Counsel should have been permitted to inquire into all these matters and to propound such interrogatories as might indicate his manner of speech, his memory, his state of health, his ability to comprehend what he had done or proposed to do, the accuracy or inaccuracy of his judgment, and generally such matters as might aid the jury in deciding the issue being tried.

The intimation in the twelfth instruction that the opinions of the medical experts, in response to hypothetical questions, should be given greater weight and consideration than those of nonexperts may as well be eliminated on another trial. The jury should be left free to pass on the relative value of the opinions of the several witnesses.

10. EXPERT  
EVIDENCE:  
weight: deter-  
mination.

In the eighteenth instruction, the jury was told, even though defendant is able to acquire property and to manage business, so as to increase his estate, "yet, if you believe from the evidence that he has not sufficient mental capacity to be trusted with the just protection of his property, and may become subject to the will of others in disposing of his property, then you should find in favor of the appointment of a guardian." The thought sought to be conveyed is evident, but not happily expressed. That he may become subject to the will of others some time is not ground for appointment of a guardian now. If, however, he has insufficient mental capacity for the just protection of his property, and his mental condition is such that he is guided by the will of

11. GUARDIAN-  
SHIP: insane  
persons.

others, rather than his own, in the disposition of property, a guardian should be appointed.

We have not undertaken to pass on all of the numerous errors assigned and the omission of any is not to be treated as an approval of the particular ruling. Some requiring consideration may have been overlooked in appellant's brief of 446 pages, wherein assignments of error, brief points, suggestions, and arguments are intermingled without much attention to order, logical sequence, or facilitating investigation. This brief is inexcusably prolix, and the cost of printing 200 pages only will be taxed.—*Reversed*.

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FRANK LENOCH, Appellant, v. R. W. YOSS AND W. E.  
WALLACE.

**Parties: WAIVER OF DEFECT.** It is probably not necessary for the wife  
1 to join with the husband as a party plaintiff in an action for  
deceit in the sale of land, but any irregularity in this respect  
is waived by failure to raise the question by demurrer.

**Fraudulent conveyances: EVIDENCE.** Although neither the contract  
2 of sale nor the deed to a tract of land refer to the number of  
acres conveyed, evidence of fraudulent representations as to the  
quantity is admissible; and where there was such evidence it  
was permissible to show that the sale was in fact by the acre,  
and that the price per acre was agreed upon.

**Sale of land by the acre: SHORTAGE: DAMAGES.** Where parties to a  
3 contract for the sale of land agree upon a price per acre, and  
there is competent evidence of the actual acreage, the damage  
for a material shortage is the price per acre multiplied by the  
number of acres it is short.

*Appeal from Iowa District Court.*—HON. R. P. HOWELL,  
Judge.

SATURDAY, JUNE 8, 1912.

THE facts are stated in the opinion.—*Reversed*.



*Grimm, Trewin & Randall* and *Barnes & Chamberlain*, for appellant.

*Wade, Dutcher & Davis*, for appellees.

SHERWIN, J.—This is a law action brought by the plaintiff to recover of the defendants damages for fraud and deceit. The plaintiff and his wife bought a farm of the defendants, which the defendants said contained one hundred and eleven acres, but which does not, in fact, contain more than ninety-four acres. The plaintiff alleged that the price agreed upon for the farm of one hundred and eleven acres was \$70 per acre, and that plaintiff paid that amount therefor. At the close of the plaintiff's evidence, the court, on the defendants' motion, directed a verdict for them, and this appeal followed. One of the grounds of the motion to direct was that there was a non-joinder of necessary parties plaintiff. A written contract was originally entered into by the parties, and in this the defendants undertook to convey to the plaintiff and his wife. But thereafter a deed was executed to the plaintiff alone.

It was probably not necessary to make the wife a party plaintiff, but, if she should have joined her husband as plaintiff, the defendants waived the matter by not demurring to the petition or raising the question by their answer. Code, sections 3561-3563; *Fulliam v. Drake*, 105 Iowa, 615; *Anderson v. Acheson*, 132 Iowa, 744; *Coe v. Anderson*, 92 Iowa, 515.

Neither the contract nor the deed stated the number of acres in the farm sold to the plaintiff, but, notwithstanding this, evidence was admissible of the fraudulent representation as to the number of acres. *Lane v. Parsons*, 108 Iowa, 241; *Hodges v. Denny*, 86 Ala. 226 (5 South. 492); 29 Am. & Eng. Enc. 629.

1. PARTIES:  
waiver of  
defect.

2. FRAUDULENT  
CONVEYANCES:  
evidence.

There was evidence of fraudulent representations as to the number of acres of land in the farm, yet the trial court excluded parol evidence that the sale was, in fact, by the acre and that the price per acre was agreed upon. This was error. *Howes v. Axtell*, 74 Iowa, 400; *Hallam v. Todhunted*, 24 Iowa, 166; *Rathke v. Tyler*, 136 Iowa, 284; *Hosleton v. Dickinson*, 51 Iowa, 244; *White v. Miller*, 22 Vt. 380; *Murdock v. Gilchrist*, 52 N. Y. 242.

There was competent evidence of the amount of land actually contained in the farm. Where the parties agree upon the price per acre, if there is found to be a material shortage, the damages sustained will ordinarily be the price per acre agreed upon multiplied by the number of acres short. This measure of damage is right, because of the solemn agreement of the parties that the land is worth the amount per acre named. *Hallam v. Todhunted*, *supra*; *Hosleton v. Dickinson*, *supra*; *Howes v. Axtell*, *supra*; *Rathke v. Tyler*, *supra*; 29 Am. & Eng. Enc., *supra*. An exception to this rule has sometimes been made where the improvements on a particular part of the land have been of unusual extent and value, but this case is not shown to be in that class. The court was clearly in error in its rulings on the admission of testimony, and in directing a verdict for the defendants. The judgment is *reversed*.

EVANS, J., taking no part.

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N. M. HART, Appellee, v. M. O. DELPHEY ET AL., Appellants; and W. S. HART, Appellee, v. M. O. DELPHEY ET AL., Appellants.

**Public lands: DECISIONS OF INTERIOR DEPARTMENT: CONCLUSIVENESS.**

- 1 The state courts are bound by a final decision of the Interior Department that lands are in fact swamp and subject to selection under the swamp land Act.

**Same: SWAMP LANDS: GRANT: TITLE.** The grant of swamp lands  
2 under the Act of Congress of 1850 was a present grant, the legal  
title however remaining in the Government until selection by the  
counties for the purpose of identification; but upon obtaining  
legal title by selection it relates back to the grant itself.

**Same: TAXATION.** The fact that the title to swamp land when ac-  
3 quired relates back to the grant by Congress will not of itself  
validate a sale of the land for taxes, made while the title stood  
in the Government or county; as during that time the land was  
exempt from taxation.

**Same: SWAMP LAND GRANT: EFFECT.** Under the swamp land Act of  
4 1850, requiring selection and proof of the character of the land  
before patent to the state, the general government holds the  
legal title in trust for the state and county until the selection is  
made and the patent issued.

**Same: CONFLICTING TITLES: ESTOPPEL.** A wife holding a quitclaim  
5 deed from the county conveying swamp land, made after the patent  
issued to the county, is not estopped from challenging the validity  
of a tax deed under a sale made when the land was not subject  
to taxation; by reason of the fact that her husband had made  
an invalid homestead entry upon the land. Besides the estoppel  
pleaded was of no avail because the plaintiff must recover, if at  
all, upon the strength of his own title.

**Same: TAX TITLE TO SWAMP LAND: PROOF.** The holder of a tax title  
6 to swamp lands can not rely thereon, in the absence of a show-  
ing that during the years for which the lands were taxed the  
state and county had parted with their title, or were estopped  
from claiming title thereto. In the instant case the evidence  
shows that the county had parted with its title to one of the lots  
in question, but not to the others, when the sales under which  
plaintiff claims were made.

**Same: ESTOPPEL.** Where the county sold and retained the purchase  
7 price of swamp land, and thereafter listed and assessed the same  
for taxes, it was estopped from claiming that the land was not  
sold and not subject to taxation, as against the holder of the tax  
title; and the county's grantee was subject to the same estoppel.

**Same.** Where the county made executory contracts for the sale of  
8 swamp land which were never performed, and the deposits made  
thereon were kept intact and finally refunded, but the county levied  
assessments and sold the land at tax sale, it was not thereby es-  
topped to deny that it had parted with its title or that it was  
subject to taxation.

**Taxation: SALES: *Caveat emptor*.** The doctrine of *caveat emptor*

9 applies to purchasers at a tax sale, and they therefore take no interest in lands not subject to taxation.

*'Appeal from Allamakee District Court.—HON. L. E. FELLOWS, Judge.*

SATURDAY, JUNE 8, 1912.

THE first of these actions was brought by Mrs. N. M. Hart to enjoin defendants from trespassing upon certain lands in Allamakee county, Iowa, and the second action was brought by Mr. Hart, more than four years thereafter, to establish his title to another tract of land in said county against the defendants, and to cancel a redemption from tax sale claimed to have been made by said defendants, or one of them, and also to quiet his title to said land. Shortly before the bringing of the second suit, plaintiff amended her petition in the first one asking that her title to the property in controversy be quieted in her and for other equitable relief. Mrs. Hart claimed to be the absolute owner of the property described in her petition, and Mr. Hart the owner of the property described in his petition in virtue of certain tax deeds. The defendants denied plaintiffs' ownership of the lands and pleaded title and right of possession in themselves. They each pleaded an estoppel of each of the plaintiffs to assert title, and in replies filed by plaintiffs they pleaded that defendants were estopped. Upon trial to the court there was a decree for each of the plaintiffs as prayed and awarding damages against the Delpheys in the sum of \$300 in favor of Mrs. Hart, and defendants appeal. *Reversed in part; Affirmed in part.*

*J. P. Conway, D. J. Murphy and H. H. Griffiths, for appellants.*

*William S. Hart, for appellees.*

DEEMER, J.—While the facts are not seriously in dispute, they are complicated and difficult to state with any degree of clearness. The land in controversy is an island in the Mississippi river near the west bank thereof, and this island is described as lots 5, 6, and 7 in section 26, township 97, range 3 west. Mrs. Hart claims to be the owner of lots 5 and 7, and Mr. Hart of lot 6, and the basis for each claim is a tax deed or deeds for said lots executed as hereinafter set forth. Defendants Delphey claim to own the same by purchase from the county and by reason of having homesteaded the same under circumstances hereinafter to be related. Each also claims that the other is estopped from making any claim to the lands. One of the claims of all parties is that the lands were "swamp" in character, that they passed from the United States government to the state, from the state to Allamakee county, and from Allamakee county to certain purchasers; and the records disclose that Mrs. Delphey has the paper title from the United States government, passing through the channels above indicated. The main reliance of the plaintiffs is upon tax deeds issued to them at various times, which defendants say were and are invalid because the lands were not subject to taxation at the times the taxes were levied against them. While defendants are relying upon a homestead entry which we shall presently consider, they, or at least one of them, is relying upon a patent from the United States government issued to the state under the theory that the lands were not subject to homestead entry, but were swamp lands, which passed to the state and county and afterward to Mrs. Delphey. So that the first question in the case is: Assuming the lands to be "swamp" in fact, when did the title to the same pass from the government and become subject to taxation? The patent did not in fact issue from the United States government until October of the year 1907, and the state patented the lots to the county in November of the same

year. However, an approved swamp land list was issued by the United States and sent to the state of Iowa in April of the year 1907, and in September of the same year Allamakee county quitclaimed all the lots to Mrs. Delphey for the sum of \$200 in cash paid by her. If this were all of the case, it would not be difficult of solution, for it is clear that under such a record the lands were not taxable before the year 1907, and the tax deeds under which the plaintiffs' claims were issued upon sales for taxes levied not later than the year 1901. In order, then, to recover under their tax deeds, plaintiffs must show that the lands were subject to taxation at the time the taxes were levied against them. That they were assessed by the county from the year 1879 to 1899 to unknown owners, and from 1899 to the time of the commencement of these actions to one or the other of the parties litigant, is not disputed. But it is also known that for the years 1894 to 1909 the lands were listed by or at the instance of Mrs. Hart, who then claimed to have an interest in part thereof, or to be one of the owners of two of the lots under a tax deed or deeds from the county.

The following facts are relied upon as showing that the lands were subject to taxation: It is said that, by reason of the character of the island, the lands comprising the same passed to the state of Iowa under the swamp land grant of the year 1850; that the state granted the same to the county; and that the county sold the several tracts at different times and to different buyers at various times—all as shown by the swamp land record still preserved in the office of the county auditor of Allamakee county. It is true that this copy of the swamp land list which was found in the county auditor's office shows the following with reference to these various lots:

Des.	Sec.	T.	R.	A.	Val.	Date.	
Lot 6	26	97	3	26.50		3-8-'64	Millet & Williams sold by S. L. C....\$33.12
Lot 5	26	97	3	56.44	50	8-8-'66	Rec'd. Treas'r Elizabeth Klett, Dep't. 28.22
Lot 7	26	97	3	29.03	75		Guthneck & Herzog, Dep't. .... 21.73

This list contains description of eighteen different tracts, and with one exception they are marked in one or the other of these methods, "sold," "sold deeded," "deeded," or "deposit." In connection herewith, we here reproduce a receipt from Guthneck which is found in the record: "\$21.73. Office of County Auditor. Harpers Ferry, Iowa, December 29, 1909. Received of S. K. Kolsrud, county auditor, Allamakee county, Iowa, twenty-one and 73-100 dollars, in full payment for money deposited with the auditor of said county years ago to purchase Gov. lot 7, section 26, township 97, range 3. Herbert Guthneck."

About the only other evidence of the sale of these lots by the county is: The assessment thereof for about thirty-three years, the payment of taxes thereon by the following named persons: Dayton, Tobiason, Ratcliffe, Hart, and the Delpheys. And tax sales of the lots or some of them in 1880 to Dayton; in 1888 to Tobiason; lots 5 and 7 in 1894 to William S. Hart & Co.; and lot 6 to Ratcliffe; in 1900 an undivided 1/60 of lot 6 to Hart; and in 1901 the remaining 59/60 of the lot to Hart. Plaintiff's title to lots 5 and 7 is based upon a tax deed issued in 1897 upon the sale of the lots in 1894 and to lot 6 upon tax deeds subsequently issued. The Harts have been in the actual possession of the lots since the issuance of the tax deeds, or at least down to the time that the Delpheys went into possession (as squatters according to plaintiff's claim) in November of the year 1902. Since that time there has

been a controversy over the title to the lots which resulted in this litigation. It seems that the lots in question were at one time selected for the county as swamp lands by one named Sargent; but this list was canceled and superseded by one made for the county by one Jarrett, a surveyor and county selecting agent, and Jarrett made an entry on the back of his list as follows:

Part of	Sec.	Sec.	Twp.	Range.	No. of Acres.	
Lot No. 5	26	96	3	56.44	)	
Lot No. 6	26	96	3	26.50	)	Omitted on
Lot No. 7	26	96	3	29.03	)	opposite page.

As will be noticed, the lots selected by him were in township 96, which the testimony now shows did not exist, but was in fact in the Mississippi river. That the naming of the township was a mistake seems reasonably clear. But here the contest deepens. The General Land Office of the United States, evidently finding some discrepancies, wrote the Des Moines land office the following letter: "Washington, D. C., October 26, 1896. 'K.' SWX. Register and Receiver, U. S. Land Office, Des Moines, Iowa—Sirs: You will please transmit to this office a certified copy of so much of the swamp land selection list, transmitted to the Decorah land office with the Surveyor General's letter of January 12, 1857, as relates to sec. 26, T. 96 N., R. 3 W. and sec. 26, Twp. 97 N., R. 3 W. The document is needed to enable this office to determine in which township the selection was actually made. If your records throw any light on the subject please report the fact in your letter transmitting the copy herein requested. Very respectfully, E. F. Best, Assistant Commissioner."

This was answered by letter from the Des Moines office dated August 9, 1897, which closed as follows: "You will see by the inclosed copy that the Surveyor General's



list shows lots 5, 6, 7, 8, 9, and 10 to be in sec. 26, 96, 3 W., while the plat in this office shows no sec. 26, 96, 3 W. (said section would come in the Mississippi river), but shows lots 5, 6, 7, 8, 9, and 10 to be in sec. 26-97-3 W. The Surveyor General does not show any swamp lands in sec. 26, 97, 3 W."

This information led to an order canceling the selection in 26-96-3, and to the following notice by letter addressed to the Des Moines land office:

Sirs: Included in swamp land selection list No. 3, Decorah series, received with the Surveyor General's letter of January 8, 1857, are lots 5, 6, 7, 8, 9, and 10 of sec. 26, T. 96 N., R. 3 W. The official plat of survey of said township on file in this office, does not show any section 26 (T. 96). The corresponding lots in sec. 26, T. 97 N., R. 3 W. agree in area with those described in said list 3, but, as the list on file in your office agrees with the one filed in this office, it can not be held that the selection was for lots in sec. 26, T. 97 N., R. 3 W. You will advise the proper state authorities of the facts above stated, and allow them sixty days within which to show cause why the selection of said lots in sec. 26, T. 96 N., R. 3 W., should not be canceled for the reason that no such description exists. In event of failure to make such showing within the time allowed, or to appeal herefrom, the selection will be canceled, without further notice. In due time report action in the matter to this office. (Indorsed on back:) 'Sept. 7, 1897, sec'y of state and auditor Allamakee Co., Waukon, Ia., notified 60 days to appeal, and copy of decision sent by registered mail.' 'April 20, 1898, reported to G. L. O. no action taken.'

The Des Moines office gave notice of the cancellation to the state and to Allamakee county and that unless appeal was taken within sixty days the same would become final. No attention was given these notices, and the cancellation doubtless became final. Neither Hart nor any of the claimants of the land were given notice of these proceedings, nor had they any knowledge thereof. In January of the

year 1903, Delphey wrote the General Land Office inquiring if he could make homestead entry of the lots, and being informed that he could do so, he (Delphey) made entry in March of the same year. He was required to make proof that the land was not swamp, and this he did in the form of affidavits. His entry was then allowed subject to a swamp title, and he was required to give notice to both state and county. This he did, and when the county received its notice it turned the same over to Hart as the real party in interest; he holding title at that time under the tax deeds hitherto mentioned, although Delphey had made, or attempted to make, redemption from the sale of lot 6. The Harts appeared and contested the homestead entry, and trials were had before the local land commissioner, who decided in favor of the Delpheys, then on appeal to the Commissioner of the General Land Office, who reversed the holding of the local land commissioner, and from the commissioner on appeal to the Secretary of the Interior, who affirmed the decision of the General Land Commissioner. The final decision was made March 28, 1907, and among other things it was found:

That Mr. Jarrett selected the lots in sec. 26, T. 97 N., R. 3 W. (instead of T. 96) is evidenced by the fact that the areas of the several lots correspond exactly with those in sec. 26, T. 96 N., R. 3 W. The same erroneous descriptions, viz., 'Sec. 26, T. 96,' were carried into the Surveyor General's list of January 8, 1857, reporting the state's claim. The county was therefore justified in claiming that the lots in controversy had been selected under the swamp grant. . . . (States that from all the testimony he thinks the land subject to overflow during the planting, growing, or harvesting season so as to injure or destroy a crop, and was in 1850. Quotes part of original United States surveyor's notes on this township made in 1849, showing white and bur oak growing therein, etc. Concludes the land is higher now than in 1850.) I am also of the opinion, and so decide, that lots 5, 6, and 7, as well as lots 8, 9, and 10, of sec. 26, T. 97 N., R. 3 W., were, in effect,

embraced in a list of swamp lands reported to this office January 8, 1857, and that the state's claim thereto was confirmed by the act of March 3, 1857, c. 117, 11 Stat. 251. The appeal is sustained, and the lots in controversy are awarded to the state. The homestead entry of Milton O. Delphey, No. 1,419, covering the said lots, is held for cancellation for the reasons above stated. Advise the parties in interest hereof, allow the usual right of appeal, and in due time make full report in the matter to this office.

On motion for review the commissioner made the following findings:

Now that a question on this point (the Jarrett list and the finding thereof) has been raised by the motion for review, the office is ready to concede that the tracts involved in this controversy were not, technically, reported. While it is clear that it was the intention to make selection of the tracts involved, it can not be said that they actually were reported. If the decision of October 16th hinged on this point alone, there might be good ground for considering the decision again. But as the case has been determined upon its merits, and no good ground appears for reviewing the decision on that basis, there is nothing to be gained by a discussion of the effect of the confirmatory act of these lands. If the lands are of the character of lands granted, and have been shown to be such by the testimony adduced at a hearing regularly held for the purpose of determining their character, it can make no difference whether they have been selected or reported as swamp, or not. This office has decided the tracts involved to have been of the character of lands granted, and rests upon that decision. This office can not agree that the doctrine of *res judicata* applies to the tracts in question. There is no record or other evidence that the question of the swampy character of these tracts was ever before considered. The decision of September 3, 1897, did not touch that question. The statement in that decision respecting lands in T. 97 N., R. 3 W., was mere dictum. Any claim which the state or its grantee may have to the lands in T. 96, and not T. 97, was the subject of that decision. For the same reason, the doctrine of estoppel, invoked in the motion, can not be applied in this case. The state's acquiescence in the decision of September

3, 1897, can in no sense be considered a waiver of its claim to anything except the erroneous selections which were the subject of that decision. The contention that neither the state nor the contestants in this case 'had or ever could have had any right to make claim' to the lands involved, as swamp, is not in accord with the view of this office. The fact that these lands were designated as swamp on your plats, and that the Harts claim them under purchase from the state's grantee, was sufficient justification for proceeding under the circular of December 13, 1886, *supra*. The failure of either the state or county to exercise its rights in the premises could not act as a bar to those who derived title through them. It was within the province of the state to have the character of these lands determined by a hearing. The same right inhered in those who claim under the state. (Smith et al. v. Miller, 22 Land Dec. Dep. Int. 372.)

On appeal to the Secretary of the Interior, that official made the following findings:

The errors assigned on appeal are enumerated in eleven specifications, yet the questions submitted for consideration may be summed up as follows: First, that the judgment of your office is contrary to law; and, second, that it is contrary to the preponderance of the evidence in the case. The matters set out in support thereof are largely a repetition of those urged in support of the motion for review denied by your office. (In considering first question presented, decision recites situation of these and adjoining island lands; swamp selections thereof, excepting in sec. 26-97-3; selections in 26-96-3, by Jarrett, by insertion on different page as recited in commissioner's decisions [see Ex. 111 above]; and cancellation of such selection in sec. 26-96-3 by decision of September 3, 1897, made final in April, 1898, after due notice to county and state.) It is now strongly urged that this was a final adjudication of any claim of the state or its grantee to the lots in sec. 26, T. 97 N., R. 3 W.; that by acquiescence in the decision of September 3, 1897, they were thereafter estopped to claim the land as swamp; and that such adjudication and cancellation being conclusive of the swamp claim under that selection, the government is likewise estopped to again consider such a claim. (Decision states that the depart-

ment can not concur in this contention; that such proceeding was one to clear the records of a claim to nonexisting lands. This action canceled such selection, but did not determine the character of other land, and what was said as to land in section 26-97-3 was dictum. 'The intent of that decision is made clear by the language of your office letter of April 29, 1898, making final the cancellation of selection of said lots in T. 96 N., and the acquiescence of the state therein can not be construed as a waiver of any claim it may have to lands in T. 97 N., under its swamp land grant.' Further refers to reasons for believing that Jarrett intended to select lands in T. 97 instead of T. 96, because of identity of number, area, etc., of lots mentioned, and the nonexistence of any such lots in sec. 26, T. 96, whereas similar lots existed in sec. 26, T. 97 N.) But whether this action on the part of the state in the particulars indicated with respect to said list amounted to a 'selection' of swamp lands within the confirmatory provisions of the Act of March 3, 1857, 11 Stat. 251, it is unnecessary to determine, in view of the finding hereinafter made, upon the record, as to the character of the lands involved. As to the contention, substantially, that the affidavits filed by Hart were not sufficient upon which to base this proceedings, your office correctly held that: 'The fact that these lands were designated as swamp on your plats, and that the Harts claim them under purchase from the state's grantee, was sufficient justification for proceeding under the circular of December 13, 1886, *supra*. The failure of either state or county to exercise its rights in the premises could not act as a bar to those who derived their title through them. It was within the province of the state to have the character of these lands determined by a hearing. The same right inhered in those who claim under the state.' *Smith v. Miller*, 22 Land Dec. Dep. Int. 372. Relative to the argument respecting the character of sufficiency of the title to these lots claimed by contestants, it need only be said that this is not a matter for the consideration of this department, but rather one for the arbitrament of the courts. (Decision then briefly reviews the evidence, and concurs with the commissioner that it thereby appears that the lands are swampy in character so as to pass by the grant of September 28, 1850.) With this

modification the judgment of your office is affirmed. The homestead entry of Delphey is hereby canceled, and the lots in controversy awarded to the state.

On motion for review, the Secretary made the following findings; the same being addressed to the Commissioner of the General Land Office:

As held by your office and the department, the failure of the state or county to exercise its rights in the premises could not act as a bar to those who derived title through them. . . . This land is of the character contemplated by the swamp land grant, . . . and that such must have been its character at the date of the grant, as appears from the evidence of record. No speculation was indulged as to the character or sufficiency of the title to these lots claimed by the contestants. The same may also be said as to the other party or parties claiming title through the state or its grantee. As was correctly said, this is not a matter for the consideration of this department, but rather one for the arbitrament of the courts.

Following these findings and decisions, a patent issued to the state, as before indicated. The first of the cases now at bar was commenced while the homestead contest was pending; but the case did not reach the district court for trial until April 1, 1910. On January 19, 1905, M. O. Delphey attempted to redeem from the tax sale of lot 6 to W. S. Hart on December 2, 1901, and the county treasurer issued a certificate of redemption reciting that: "M. O. Delphey had that day redeemed the undivided 59/60 of lot 6, sec. 26-97-3 (26½ acres), from sale to W. S. Hart on December 2, 1901; that the sale was for 95 cents for delinquent taxes of 1899 and 1900; and that Delphey had paid in redemption thereof the sum of \$1.29 in full of sale, penalties, interest and costs," etc.

As soon as Hart learned of this redemption, he gave notice to the county auditor and county treasurer, "reciting that the pretended redemption of the undivided 1/60 of lot 6, sec. 26-97-3, from sale for taxes to Wm. S. Hart

on December 3, 1900, by M. O. Delphey, made about January 19, 1905, is null and void, 'for the reason that the said Delphey, either himself or as agent, attorney or representative, has no interest, title, ownership, lien, equity, or claim of any kind or nature whatsoever,' in or to said land or any part thereof, and said officers should deal therewith as though no such attempted redemption had been made from said sale; that the certificate of tax sale is still valid and outstanding and held by Wm. S. Hart."

Thereafter and on November 27, 1908, the county treasurer made a written statement to the effect that: "Wm. S. Hart had tendered to surrender his certificates at tax sale of following described property: Undivided 1/60 of lot 6 in sec. 26-97-3 sold Dec. 3, 1900, and undivided 59/60 of said lot 6 sold Dec. 2, 1901. 'And that I have now and heretofore refused said tender and demand because of my understanding that the books at my office show the said premises to be redeemed from each of said sales.'"

Taxes for the years 1908 and 1909 upon all the lots were paid by the Delpheys. On August 7, 1908, Hart gave defendants Delpheys notice of expiration of period of redemption from the tax sales of lot 6, both of the 1/60 and the 59/60; but the county treasurer refused to make deeds and gave the written statement before set out. W. S. Hart then brought his suit to set aside the redemptions from tax sale and to quiet his title and to require the execution of tax deeds to lot 6. Upon the trial of the case in the district court, one Collins, deputy auditor of the county from 1880 to 1884, and auditor from 1884 to 1896, testified that these lots were not assessed at all, and that if assessed it was through mistake, and that he canceled the assessments. He also testified that as auditor he returned to one Kletts \$27 purchase money paid for the lots because no deed was ever produced showing that they had passed from the county. He also testified that one Hubert Guthneck made demand for a deed. There were also introduced



the following receipts: One given by H. L. Johnson, Collins' successor as county auditor, "for cash deposited by H. Guthneck to purchase island in 97-3. \$21.73." Collins also testified that his predecessor turned over money to him which had been paid by William Kletz and Hubert Guthneck for the land in controversy, and that as he found the county had no title and could not make a deed, he so informed the parties, and finally paid Kletts back his money, but refused to pay Guthneck because he had no receipt that he turned his money over to his successor, taking his receipt as before indicated, and as already shown. Guthneck finally received from the county auditor December 29, 1909.

Guthneck was also a witness, and he testified as follows:

Once had an interest in lot 7, one of those where Mr. Delphey lives. This was so long ago I can't remember the date. It was the government land. Mr. Ryan, then county treasurer, told me I need not pay taxes on it; that he couldn't give me a deed for it, and I needn't pay any taxes on it. I paid \$1.25 an acre for it, if I am not mistaken. Held it for several years, and at last one of the Daytons (not any of the lawyer Daytons) came at me and wanted me to buy it, to pay \$15 for it, and I told him I had already paid for it and he has no right to collect anything from me for that lot. I never tried to get a title for the lot. I did not get a title or my money back. I remember when Mr. Collins was county auditor. Don't remember now whether I demanded my money from him or not. Got a little hay off of the lot. Held it as long as I thought I owned it. Did not know I had no right to it until Mr. Dayton came to me as above stated. This was 34 or 40 years ago. Since then have exercised no ownership over it. Once when the supervisors were down to Harpers Ferry on public business in a body, I told them about it, and that I wanted my money back. This was verbal, not written. They made no effort to get me my money, and I never received anything. The talk with the supervisors was some years ago. Q. The man you paid this



money to was John Ryan, county treasurer, was it? A. I think it was; yes, sir.

The Delpheys claim to have made some improvements upon the land, 'but the extent thereof they much exaggerated. These improvements were described as follows: "When I was there before the trial of the contest, I noticed some shanties and tents the clammers used, and a chicken house made of poles, and a hogpen, and the house; there were some short two by fours set up, either in the ground or attached to a frame. Two men could easily have built the poultry house, hogpen, and set up the two by fours in one day or less."

Such is the unusual and complicated record in the case, eliminating all extraneous matter. Going now to the mer-

its, we are bound, we think, by the final decision of the Land Department to hold that the lands were not subject to homestead entry, and that they were in fact swamp and subject to selection by the county as such. *Brown v. Hitchcock*, 173 U. S. 473 (19 Sup. Ct. 485, 43 L. Ed. 772), and cases cited.

And under previous decisions construing the swamp land grant, we must hold that the grant of 1850 (Act Sept. 28, 1850, chapter 84, 9 Stat. 519) was a present one, but that the legal title remained in the general government until selection by the counties for the purposes of identification, and that until such selection no title in fact passed to the county. *Tubbs v. Wilholt*, 138 U. S. 134 (11 Sup. Ct. 279, 34 L. Ed. 887).

But the right to the legal title emanates from the grant itself, and, when the legal title is obtained, it as a general rule relates back to the grant itself. *Chandler v. Mining*

*Co.*, 149 U. S. 79 (13 Sup. Ct. 798, 37 L. Ed. 657); *McCormick v. Hayes*, 159 U. S. 346 (16 Sup. Ct. 37, 40 L. Ed. 171); *Brown v. Hitchcock*, 173 U. S. 473 (19 Sup. Ct. 485, 43

1. PUBLIC LANDS:  
decisions of  
interior de-  
partment: con-  
clusiveness.

2. SAME: swamp  
lands: grant:  
title.

L. Ed. 772); *Young v. Charnquist*, 114 Iowa, 116; *Ogden v. Buckley*, 116 Iowa, 352; *Carr v. Moore*, 119 Iowa, 152; *Rogers Locomotive Works v. Emigrant Co.*, 164 U. S. 559 (17 Sup. Ct. 188, 41 L. Ed. 552). In the latter case it is said: "While, therefore, as held in many cases, the act of 1850 was *in praesenti*, and gave an inchoate title, the lands needed to be identified as lands that passed under the act; which being done, and not before, the title became perfect as of the date of the granting act." In *Wright v. Roseberry*, 121 U. S. 488 (7 Sup. Ct. 985, 30 L. Ed. 1039), the court said: "The result of these decisions is that the grant of 1850 is one *in praesenti*, passing the title to the lands as of its date, but requiring identification of the lands to render the title perfect; that the action of the Secretary in identifying them is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is intrusted."

But this doctrine of relation back to the date of the grant does not of itself validate tax sales during the time the title is in either the government or the county, for so long as the title stands in either it is exempt from taxation. *Hussman v. Durham*, 165 U. S. 144 (17 Sup. Ct. 253, 41 L. Ed. 664); *Sargent v. Her- rick & Stevens*, 221 U. S. 404 (31 Sup. Ct. 574, 55 L. Ed. 787); *Grant v. Iowa R. R. Land Co.*, 54 Iowa 677; *Reynolds v. Plymouth Co.*, 55 Iowa, 93. In *Hussman's* case it is expressly held that the doctrine of relation can not be invoked to give effect to the wrongful taxation of land while both the legal and the equitable title were in the United States. Until the United States issued its patent to the state, the legal title to the land in controversy was in the United States government, and the right of either the state or the county to tax it did not exist, unless it appears that the equitable title was in the state or county, and not then unless the title, legal or equitable, had passed from the state and county, for so long as it remained in either the

3. SAME:  
taxation.

state or county, it was exempt from taxation. *Iowa County v. Story County*, 36 Iowa, 48.

Under the facts above recited with reference to the selection of the lots, we are disposed to agree with the decisions of the land commissioners and the Secretary of the Interior in holding that the equitable title to the land passed to the state and in virtue of the statutes of the state to the county, and that the general government held the same in trust for the state or county.

It is very clear, we think, that the Delpheys took nothing under the homestead entry; but Mrs. Delphey holds the paper title from the county under the quitclaim deed to her after the issuance of the patents. She is not herself estopped from challenging plaintiff's title because of the contest over the homestead entry, nor by reason of any other act on her part, although her husband might be if he were asserting any right in virtue of his purchase from the county after the patents were issued.

Indeed, the estoppel pleaded by plaintiffs, and so strongly relied upon by them, growing out of the defendants Delphey's conduct, is of no avail because they must recover, if at all, upon the strength of their own title, and not because of any weakness of that under which their adversaries claim. This proposition is too fundamental to require citation of authorities.

Having found that the equitable title to the land was in the state or county, still the plaintiffs are not entitled to rely upon their tax deeds, unless it be shown that, during the years for which the lands were taxed, both state and county had parted with their titles, or that they so conducted themselves with reference to the lands that they remain the owner of the lots. Having passed all its swamp lands to the counties, whatever equitable title the state had, passed

4. SAME: swamp  
land grant:  
effect.

5. SAME:  
conflicting  
titles:  
estoppel.

6. SAME: tax  
title to  
swamp land:  
proof.

to or really belonged to the county, so that the final inquiry here is: Did the county sell these lots or any of them? And, if not, has it so treated them that it has estopped itself from claiming title thereto?

While by reason of lapse of time the testimony is obscure upon this proposition, we think there is enough to show that the county sold what is known in this record as lot 6, which it appears was sold to Millett and Williams, March 8, 1864. The county proceeded to tax the land as having been sold, and so far as shown kept the money which it received from the sale of the lots, to wit, \$33.62, and still holds the same. The record also discloses that there was no sale of either lots 5 or 7; that there was some kind of a deposit upon them which in neither case amounted to a sale; that neither of the sales were ever consummated, but the money was returned to the depositors because the county could not give title. It is true that the testimony as to some of these matters is not very explicit, but we think it establishes the facts as we have found them to be.

As the county sold lot 6 and received the money therefor, which it still retains, and as it treated the lot as sold by regularly listing and assessing the same, we think it is estopped from saying that the lands had not in fact been sold and were not subject to taxation. As Mrs. Delphey holds under a quitclaim deed from the county, she acquired no greater rights than the county, and is also estopped from asserting title to lot 6 under her quitclaim deed from the county.

The attempted redemption from the tax sales by Mr. Delphey is of no validity because he had no such title or interest in or to the lands as would authorize him to redeem.

As to lots 5 and 7, the county did nothing which estopped it from claiming title under the patents from the general government and from the state. There is no testi-

mony that it ever sold them. The most that can be claimed

8. SAME.

is that it made some kind of an executory contract of sale for each of the lots which was never carried out by the purchasers. It kept the deposits intact and finally refunded them to the proper purchasers. These purchasers did not hold even an equitable title to the lots. All that the county did was to levy assessments against them and to sell the same at tax sales for small amounts. The mere levy of taxes and sale of lands has many times been held not to estop either the county or state. *Young v. Charnquist*, 114 Iowa, 116; *Howard Co. v. Bullis*, 49 Iowa, 519; *Buena Vista Co. v. Iowa Falls Co.*, 46 Iowa, 226; *Bixby v. Adams Co.*, 49 Iowa, 507.

It must be remembered, in this connection, that neither of the plaintiffs is claiming title from the county by reason of any sales made by it of its swamp lands. Their

9. TAXATION:  
sales: caveat  
emptor.

titles are based upon tax sales, and a purchaser at tax sales gets nothing through his purchase if the lands were not subject to taxation. In other words, the doctrine of *caveat emptor* applies to such a purchaser. *Games v. Stiles*, 14 Pet. (U. S.) 322 (10 L. Ed. 476).

The cases relied upon by appellees upon the question of estoppel are not in point, as an examination will show. They are distinguished in the cases we have cited and need not be more specifically referred to.

In the first case a judgment and decree was given for N. M. Hart, quieting title to lots 5 and 7, and rendering judgment for plaintiff in the sum of \$300. This seems to be erroneous, and it must be, and it is, reversed. In the second case brought by W. S. Hart, there was simply a decree for the plaintiff without any judgment except for costs. This decree seems to be correct, and it is affirmed. The costs will be equally divided between appellants and appellees.

First case *reversed and remanded*. Second case *affirmed*.

MARY E. MITCHELL, ANNIE E. CLARK and Others, Appellants, v. F. E. VEST and ADDIE VEST and MARY E. MITCHELL and Others, Appellants, v. JAMES McDONALD and Others, and MARY E. MITCHELL and Others, Appellants, v. J. F. EWING and Others, MARY E. MITCHELL and Others, Appellants, v. C. H. TAYLOR and Others, Heirs of WILLIAM EMSLIE, deceased, Appellants, v. S. A. HUNTER and Others, Heirs of WILLIAM EMSLIE, deceased, Appellants, v. W. C. MCKEE and Others, and J. W. CARR, Executor, v. ANNA E. CLARK and Others, Appellants.

**Wills: ELECTION BY WIDOW.** A will bequeathing one-half of all testator's estate to his widow in fee and the other half to her for life, with the provision that whatever remained at her death of the one-half given her for life should go to the heirs of the testator, gave the wife a life estate in the remaining one-half and left nothing from which she could take a distributive share; and she was required to elect whether she would take under the will or the statute.

**Same.** The final report of the widow as executrix under the will of her husband, giving her one-half the estate in fee and the other half for life, which showed the probate of the will, full settlement of the estate, and that she was in possession of all the property, was a sufficient election to take under the will.

**Same: DEVISE: HEIRS: NONRESIDENT ALIENS.** Nonresident aliens can not acquire real property under a will devising the same to the legal heirs of the testator; as the legal heir of another must have inheritable blood, and the statutes of this state prohibit such aliens from taking the property of testator, either by descent or devise.

**Same: REMAINDER: WHEN VESTED.** A will bequeathing a life estate to the widow and whatever may remain to the legal heirs of the testator, vests the remainder in those heirs qualified to take the property at the time of the testator's death; it is only the enjoyment that is postponed.

**Acknowledgment of instruments: QUALIFICATION OF NOTARY.** An attorney for the mortgagee in foreclosure proceedings has no such interest in the matter as will disqualify him from taking the acknowledgment of the sheriff's deed, and thus render the same invalid.

**Co-tenants: OUSTER: ADVERSE POSSESSION.** Ordinarily a tenant in common can not hold adversely to his co-tenant, or a life tenant to the remaindermen; but this rule only applies where the relationship is continuous. So that where a life tenant foreclosed a mortgage which she held upon the property and acquired a sheriff's deed, the remaindermen having knowledge of the proceedings, and thereafter claimed to hold the property under color of the sheriff's deed, there was a sufficient ouster to set the statute of limitations in motion.

**Wills: ELECTION: SATISFACTION OF DEBT TO LEGATEE.** Under a will giving the widow one-half the property in fee and the remainder for life, the interest under the will being less in value than the amount of a valid mortgage held by her on the property, she was not put to an election; and as the will provided for the payment of all just debts, the doctrine of satisfaction of the mortgage has no application, as that question arises only where the legacy is equal to or greater than the debt.

**Former adjudication.** To constitute a former adjudication there must be an identity of subject matter, cause, parties and of quality of the persons: Thus in an action by remaindermen against those claiming under the life tenant who foreclosed a mortgage on the property and held it adversely for the statutory period, the judgment between the plaintiffs and a third person in the partition of other land owned by plaintiff's testator was not an adjudication of plaintiff's rights in this action.

*Appeal from Poweshiek District Court.—Hon. W. G. CLEMENTS, Judge.*

TUESDAY, JUNE 25, 1912.

THE opinion gives the facts and issues.—*Affirmed.*

*J. M. Goodson*, for appellants.

*Talbott & Talbott* and *J. W. Carr*, for appellees.

SHERWIN, C. J.—William Emslie died in 1893, the owner of the lands in controversy. He left surviving him his widow, Mary S. Emslie, and six brothers and sisters, but no issue. Of these brothers and sisters but two, George Emslie and Annie E. Clark, were residents of the United States. The others were aliens residing in England and Wales. Annie E. Clark and Mary E. Mitchell are the two surviving sisters of William Emslie; the other brothers and sisters having died before the commencement of these actions. The plaintiffs herein, other than Mary E. Mitchell and Annie E. Clark, are the heirs of these deceased brothers and sisters. William Emslie left a will as follows:

First. I direct that all my just debts, including funeral expenses, be paid as soon after my decease as can be done without injury to my estate.

Second. I give, devise and bequeath unto my beloved wife, Mary S. Emslie, one-half of all my estate, both real and personal, absolutely and in fee simple. And I also give, bequeath and devise unto my said wife Mary S. Emslie, the use, rents and profits, control and enjoyment of the other one-half of all my estate both real and personal for and during her natural life.

Third. At the death of my said wife, Mary S. Emslie, I give what may be then remaining of one-half of my estate to my legal heirs.

Fourth. I hereby revoke all former wills by me at any time made.

Fifth. I hereby nominate and appoint my beloved wife, Mary S. Emslie, sole executrix of this my will and request the court to confirm her appointment without bond.

This will was duly admitted to probate. The widow, Mary S. Emslie, was appointed executrix thereof without bond, entered into possession of the property, and continued such possession until her death in 1903. She left a will naming J. W. Carr as executor of her estate and authorizing him to sell all of her property, both real and personal, and directing him to pay from the proceeds thereof the legacies and bequests provided for therein. Carr qualified as



executor, and in due time sold the land in question herein, as such executor. These actions were brought in 1908 and 1909 against the parties who purchased from J. W. Carr, as executor of the estate of Mary S. Emslie, to recover an undivided one-half interest in and to the lands and to quiet the title thereto. In the several actions, the appellants claim to be the owners of an undivided one-half interest in the lands as devisees under the will of William Emslie. Several defenses were interposed, which we shall further notice in the course of the opinion. The court found against the appellants in all of the cases.

I. There is no question but what the will of William Emslie gave to his wife one half of his estate in fee, and a life estate in the other half thereof. The controversy between the parties on this branch of the case is whether the widow was entitled to a distributive share of the land in question under the statute, in addition to that given her by the will. We think it clear that the widow was not entitled to and did not take a distributive share under the law. The third clause of the will expressly provided that, at the death of the widow, whatever remained of the one-half of the estate given to her for life should go to the heirs of the testator. This was an explicit direction that the remainder of the life estate given to his widow should, after her death, be given to his legal heirs. The life estate that had already been given to the widow was one-half of the whole estate, and not what remained of such one-half after her distributive share had been taken therefrom, and this disposition of the remainder of the life estate would leave nothing from which the distributive share could be taken, and required an election on the part of the widow whether she would take under the will or under the statute. *Parker v. Parker*, 129 Iowa, 600; *Snyder v. Miller*, 67 Iowa, 261; *Mohn v. Mohn*, 148 Iowa, 288; *Warner v. Hamill*, 134 Iowa, 279.

That she elected to take under the will can not be

P. v. P. when will  
deak.  
inherits deak.  
she will in  
line, she  
can't take both  
under will & Stat.

seriously questioned. In December, 1896, she filed a final report as executrix, in which she stated that William Ems-

lie left a will in which he gave her one-half  
2. SAME.

of all his estate absolutely "and the other half thereof to her for and during her lifetime, giving her full custody and control thereof, which said will was . . . duly admitted to probate, and is now on file in the office of the clerk of this court, to which reference is made." She further stated in her report that she had paid all costs and charges against said estate; that the estate was fully settled; and that she, as sole legatee named in the will, was in possession of all, and singular, the estate of said William Emslie, remaining after the payment of the debts and charges against said estate. This report was duly recorded, and under our decisions constituted an election to take under the will rather than under the statute. *Mohn v. Mohn, supra*; *Craig v. Conover*, 80 Iowa, 355; *In re Franke's Estate*, 97 Iowa, 704.

II. At the time of his death, William Emslie, his brother, George Emslie, and his sister, Annie E. Clark, were citizens of the United States. William Emslie's

other brothers and sisters were at the time  
3. SAME: devise:  
heirs: nonresi- nonresident aliens. The plaintiffs, William  
dent aliens. M. Emslie, D. F. A. Emslie, Jane Cook,

Orpha Emslie, Agness Williams and Anna Holmes are the children of George Emslie, deceased. All of the other plaintiffs, except Annie E. Clark, are children of the now deceased alien brothers and sisters. The appellees contend that the alien brothers and sisters of William Emslie could not, and hence did not, take anything under the will of William Emslie, because they were not his legal heirs at the time of his death, and therefore not of the class to whom he devised the remainder of the one-half of his estate. Chapter 85, Acts of the Twenty-Second General Assembly, was in force at that time, which provided as follows so far as material here: "Section 1. Nonresident

aliens . . . are prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase, or otherwise, only as hereinafter provided." Section 2 of the act provided that any non-resident might acquire and hold certain real property on condition that, within a certain time from the date of its purchase, he place the same in the actual possession of a relation who shall comply with certain other conditions named in the act.

In *Bennett v. Hibbert*, 88 Iowa, 154, the will under consideration devised to the defendant Hibbert, who was a nonresident alien, certain lands as the remainder of the testator's estate. The question was there presented whether he could take under the provisions of chapter 85, Acts of the Twenty-Second General Assembly. It was held that Hibbert could take under the will, because he was a purchaser within the meaning of the second section of the act. While the alien brothers and sisters of William Emslie would take, if at all, as devisees under the will, they could only take as such devisees by showing that they were his legal heirs at the time of his death, for the devise is expressly limited to such heirs. His brother George Emslie, and his sister Annie E. Clark, were legal heirs, because they were citizens. But the nonresident alien brothers and sisters were not legal heirs of the testator for the reason that the statute prohibited their taking by descent under the law. In *Opel v. Shoup*, 100 Iowa, 407, it was held that section 1 of the act under consideration prohibited the descent of property to nonresident aliens, and that such aliens were not heirs who could inherit property in this state. We also held, in *Burrow v. Burrow*, 98 Iowa, 400, that a nonresident alien could not take by descent. And see, also, *Furenes v. Mickelson*, 86 Iowa, 508; *King v. Ware*, 53 Iowa, 97; *Brown v. Pearson*, 41 Iowa, 481.

To constitute one the legal heir of another, he must have inheritable blood. 2 Blackstone, 249. And where

the Legislature of the state where the real property is situated has declared that nonresident aliens shall not take by descent, there is clearly no inheritable blood in such alien. The will was made shortly before the testator's death, when the act of the Twenty-Second General Assembly was in force, and it is to be presumed that the term "legal heirs" was used for a purpose. The testator's brother George, and his sister Annie E. Clark, were heirs who could take upon his death, and we think it must be held that they alone took under the will, and, if that be true, only Annie E. Clark and the heirs of George Emslie can have any possible interest in the land in question.

To avoid the effect of the act of the Twenty-Second General Assembly and our decisions thereunder, the appellants urge that nonresident aliens were protected by a treaty

4. SAME:  
remainder:  
when vested. between the United States and Great Britain, which became effective in 1900, and this claim is made on the theory, as we understand the argument, that no title in the remainder of the estate vested in the remaindermen until the death of Mary S. Emslie, which was in 1903. The will says: "I give what may be then remaining of one-half of my estate to my legal heirs." We think the unused portion of the remainder vested in the heirs of the testator immediately upon his death. The language clearly indicates the intent to have the gift become complete upon the death of the testator, and that the enjoyment of it was alone postponed. Generally speaking, an "heir" is he upon whom the law casts the estate immediately upon the death of the testator. *Johnson v. Bodine*, 108 Iowa, 594. And unless the will itself clearly indicates the intent of the testator to postpone the vesting of the interest, it will vest at once upon his death. A direction for a division among the testator's legal heirs refers to the persons answering that description at the time of his death, unless a contrary intent is plainly manifested by his will. *Johnson v. Bodine*,

*supra*; *Blackman v. Wadsworth*, 65 Iowa, 80; *Clark v. Shawen*, 190 Ill. 47 (60 N. E. 116); *Burton v. Gagnon*, 180 Ill. 345 (54 N. E. 279); *Abbott v. Bradstreet*, 85 Mass. 587; *Minot v. Tappan*, 122 Mass. 535. In *Westcott v. Meeker*, 144 Iowa, 311, relied upon by the appellants, the remainder was to go to the heirs of a son of the testator after the son's estate had ceased, and the heirs of such son, who were claiming under the will, were not born when the will was executed nor when the testator died. In that case, there was uncertainty as to who the heirs of the son might be, while here no such uncertainty existed. The only uncertainty in this case was as to the amount that would eventually go to the remaindermen. Whatever the amount be, it vested in the remaindermen at the same moment that the widow's interest under the will vested in her.

III. In 1894, after Mary S. Emslie had qualified as executrix of the estate and had taken possession thereof, she brought an action in equity in her own name against

5. ACKNOWLEDG-  
MENT OF IN-  
STRUMENTS:  
qualification  
of notary.

herself as executrix and against George Emslie, Annie Clark and the nonresident alien brothers and sisters of William Emslie, in which she asked the foreclosure of a mortgage given to her by her husband, William Emslie, to secure his note to her of about \$10,000, which mortgage seems to have included practically all of the real estate in controversy in this action. George Emslie and Annie E. Clark were personally served with notice of such suit and made default. The nonresident alien defendants were served by publication and made no appearance. There was a decree of foreclosure in November, 1894, and the land was soon thereafter sold under special execution and bid in by Mary S. Emslie, and she subsequently obtained a sheriff's deed therefor. The suggestion of the appellants that the sheriff's deed was invalid, because the acknowledgment was taken by Mrs. Emslie's attorney, is without support

in the authorities cited. The attorney clearly had no such interest in the matter as would disqualify him.

The appellants contend that Mary S. Emslie entered into possession of the property in controversy under and by virtue of the will of her husband, and became thereby a tenant in common and remained such during her lifetime; that, as such tenant in common, she could obtain no title adverse to the appellants; and, further, that because she was the executrix under the will, she could acquire no title adverse to them; that, as a life tenant, she was bound to protect the property by taking care of the incumbrances thereon; and that if any debt existed in her favor, which she had the right to enforce, it was satisfied by the legacy given and accepted by her under the will of her husband. The appellees concede that a life tenant or a tenant in common can not ordinarily hold adversely to the remainderman or cotenant, but they say that this rule is applicable only where such relationship is continuous and uninterrupted and does not apply where there has been an ouster or disseisin, followed by adverse possession under color of title or claim of right for the statutory period. This exception to the general rule is well recognized, and, where the cotenant or remainderman has knowledge of the character of the possession and of the claim of exclusive ownership, it amounts to an ouster and sets the statute in motion. Freeman on Cotenancy, sections 221, 235, 373; 1 Cyc. 1072, 1076; *Murray v. Quigley*, 119 Iowa, 6; *Crawford v. Meis*, 123 Iowa, 610; *McCarthy v. Colton*, 134 Iowa, 658.

It is conceded that George Emslie and Annie E. Clark had actual knowledge of the fact that Mary S. Emslie had foreclosed the mortgage which she held against her husband, William Emslie, and that said Mary S. Emslie, after receiving the sheriff's deed, was claiming to be the absolute owner of all of the real estate covered by said mortgage, and that she continued to make such claim as long as she

6. COTENANTS:  
ouster:  
adverse  
possession.

lived. The sheriff's deed was sufficient to give color of title to the hostile acts of Mary S. Emslie, and the subsequent acts of her executor in conveying all of said land, and in thereafter bringing suit to quiet title thereto, was all notice to interested parties that any and all claims of cotenants or remaindermen had long since been repudiated. Annie E. Clark and the plaintiff heirs of George Emslie are clearly barred under the rule of the cases cited.

Appellants say that Mary S. Emslie could not acquire title by deed against them because she was the executrix of the estate of her husband, but their position is no stronger under such claim than under the claim of cotenancy. She held a valid claim against the estate, and there is no claim of fraud in connection therewith. She took it into court and secured an adjudication that it was a valid and subsisting debt of the estate. There was no personal liability for this debt; all that she could do was to hold the estate or the security provided in the mortgage, for she could not compel contribution on the part of appellants. Moreover, appellants have never offered to contribute toward the payment of this just claim, and they do not now offer to do so. The contention of the appellants that, because Mary S. Emslie accepted under the will, she renounced every right inconsistent with its provisions and was estopped to assert any right under the mortgage, is not sound under the facts in this case. There was, in our judgment, no inconsistency here. The note and mortgage were not specifically disposed of by the will, and at the death of the testator they remained the separate property of Mary S. Emslie and a valid and subsisting claim against the estate. The note was negotiable, and no claim can be made that she might not have sold it without in any way affecting her rights under the will, and if it might, under such circumstances, have been enforced by the purchaser thereof, we see no reason why Mary S. Emslie was put to any election. The

7. WILLS: election: satisfaction of debt to legatee.

will expressly provided that all debts of the testator be first paid from his estate, and no exception was made of the debt which he owed his wife. The doctrine of satisfaction, as applied to cases arising under wills, can ordinarily be applied only when the legacy given by the debtor to the creditor is equal to or greater in amount than the debt, and it must be not only equal in amount, but equally beneficial, and of the same nature exactly. Bispham's Principles of Equity (6th Ed.) section 538.

The doctrine rests on the presumption, under the circumstances stated, that the legacy was intended as a satisfaction of the debt. Such presumptions are not favored by equity, however, and it is the general rule that slight circumstances will rebut them. Thus it has been held that a direction in the will for the payment of debts rebuts the presumption. *Chauncey's Case*, 1 P. Wms. 408; *Strong v. Williams*, 12 Mass. 391 (7 Am. Dec. 81); *Wesco's Appeal*, 52 Pa. 195; *Van Riper v. Van Riper*, 2 N. J. Eq. 1; Story's Equity, sections 1104, 1119, 1123. And where the legacy was less than the amount of the debt, or is of a different nature, the same rule is applied. See cases *supra*. In addition to the fact that the will expressly provides for the payment of all just debts, it fairly appears from the record before us that the legacy here was much less than the debt.

IV. In 1905, one H. P. Johnson brought an action of partition against some of the Emslie heirs and secured a decree therein. The action did not relate to or involve any of the land in controversy in this suit; but the appellants claim that it was nevertheless an adjudication as to this land. This can not be so for several reasons. The issues were not the same, the parties were not the same, and the land involved therein was not a part of the land mortgaged to Mary S. Emslie. There is neither identity of subject matter, identity of cause, identity of persons or of

8. FORMER  
ADJUDICATION.



parties, nor identity of the quality of the persons, all of which are required. *Woodward v. Jackson*, 85 Iowa, 432; *In re Dille*, 119 Iowa, 575; 21 Am. & Eng. Enc. 227.

Other matters are discussed by the appellants, but what we have already said disposes of the controlling questions, and we need not extend this opinion. For the reasons stated, the judgment of the trial court should be and it is, —*Affirmed*.

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G. E. POWERS v. IOWA CENTRAL RAILWAY COMPANY,  
Appellant.

**Evidence: SPEED OF TRAIN: COMPETENCY OF WITNESS.** Witnesses of  
1 average intelligence, having knowledge of time and distance, and who saw a passing train at the time of an accident, are competent to testify to its rate of speed.

**Same: ADOPTION OF ORDINANCES.** The testimony of the town clerk  
2 that a record book of the council offered in evidence showed the proceedings relative to the passage of a speed ordinance was competent for the purpose of identification. It was also competent for him to state that the ordinance was signed by the mayor and published according to law.

**Railroads: CROSSING ACCIDENT: CONTRIBUTORY NEGLIGENCE: EVIDENCE.**  
3 Where the evidence in an action for a railroad crossing accident conclusively established the fact that had plaintiff looked when nearing the track he could have seen the approaching train and avoided the injury, his testimony that he did so look presented no such conflict in the evidence as to require submission of that issue.

**Same.** One driving upon a railroad crossing knowing that a train  
4 was due about that time, without looking to see if it was approaching, was guilty of contributory negligence as matter of law.

**Same: NEGLIGENCE: SUDDEN EMERGENCY.** Where an emergency arises  
5 through the negligent act of the injured person he can not recover; as where he neglected to look for an approaching train upon nearing the crossing, until within the zone of danger, when his team was frightened and he was thus prevented from discovering his peril.

**Same: LAST CLEAR CHANCE.** Where the engineer of a train saw  
6 plaintiff approaching the crossing but supposed he would exer-

cise reasonable care and not drive onto the track ahead of the train, but when discovering he did not intend to stop it was too late to prevent the accident, the doctrine of last clear chance has no application.

*Appeal from Hardin District Court.*—HON. C. G. LEE, Judge.

TUESDAY, JUNE 25, 1912.

SUIT to recover damages occasioned by one of the defendant's trains. Verdict and judgment for plaintiff. Defendant appeals.—*Reversed.*

*Geo. W. Seevers and W. H. Bremner and E. P. Andrews*, for appellant.

*Lundy, Wood & Baskerville*, for appellee.

SHERWIN, J.—The defendant's railroad track intersects the main street of the town of Liscomb at about right angles; its depot being on the north side of the street and west of its line of railway where they intersect. The plaintiff was driving west on Main street, and was struck on this crossing by a freight train coming from the south. One of the grounds of negligence alleged was that defendant was running its train at a rate of speed prohibited by an ordinance of the town, and at an unreasonable and dangerous rate of speed. The ordinance in question made it unlawful to run a train within the town at a greater rate of speed than eight miles per hour.

The defendant objected to the testimony of witnesses as to the speed of the train immediately before it struck the plaintiff, and now insists that such testimony was incompetent, because sufficient foundation therefor had not been laid. The witnesses examined on this question showed that they

1. EVIDENCE:  
speed of train:  
competency  
of witness.

were men of average intelligence and observation, having knowledge of time and distance, and that they saw the train at the time in question. We think their testimony was competent. *Ressler v. Railway Co.*, 152 Iowa, 449; *Omaha St. Ry. Co. v. Larson*, 70 Neb. 591 (97 N. W. 825); 8 Century Dig. 492.

J. B. Sweet was clerk of the town of Liscomb when the ordinance regulating the speed of trains was passed, and he testified for the plaintiff that he was present at the meeting of the council when the ordinance was finally passed. He was then asked whether the record book showed the proceedings of the town council of the incorporated town of Liscomb with reference to the passing of Ordinance No. 20 (the ordinance in question). The defendant's objection, because the book itself was the best evidence of what it contains, was overruled. Of this complaint is made. This testimony was competent for purposes of identification. But, even if defendant's theory were correct, the ruling was not prejudicial, because the book itself, so far as material, was in evidence.

Objection was also made to Sweet's testimony that the ordinance was signed by the mayor during his term of office in 1903, and to his testimony that the ordinance was published by posting notices. Objection was also made to the ordinance itself. All of this testimony, and the ordinance itself, was in our judgment competent. It was clearly competent to show by parol that the ordinance was properly signed by the mayor, and that the ordinance was published in accordance with the requirements of the statute. *City of Des Moines v. Casady*, 21 Iowa, 572; *Larkin v. Railway Co.*, 85 Iowa, 502, and *Id.*, 91 Iowa, 655; *Bayard v. Baker*, 76 Iowa, 220.

The appellant moved for a directed verdict on the ground, among others, that it conclusively appeared that plaintiff was guilty of contributory negligence, and it

is now insisted that the motion should have been sustained.

3. RAILROADS:  
crossing acci-  
dent: contribu-  
tory negli-  
gence: evi-  
dence.

The plaintiff had lived in the neighborhood of Liscomb for many years. He was thoroughly familiar with the crossing in question, and knew that a freight train was due in Liscomb from the south at about 8 o'clock in the morning, the time that he was struck. From a point eight or ten rods east of the crossing, there was an unobstructed view of the defendant's track south for, at least, a half a mile. The plaintiff says that he was approaching the crossing at a trot, and that at a point eight or ten rods east thereof he glanced down the track, but saw no train. He further testified that his horses continued to trot toward the crossing, and that, when about two or three rods east thereof, the team that he was leading became frightened at something, and started north around the end of the wagon that he was in; that at that time he attempted to again look south for a train, but was unable to do so, because of the action of his team. He further says that, when the team he was leading started up, the other team also started, and that he had difficulty in controlling both; that the team that he was driving carried him onto the track just ahead of the defendant's engine; and that he then, for the first time, knew of the presence of the train. During all of the time that plaintiff was approaching this crossing, he sat on a seat with his back to the south, the direction from which the train in question was due at that time. If this train was running at the highest speed claimed by the plaintiff, fifteen miles per hour, and the plaintiff was approaching the crossing with his horses on the trot, which would be at the rate of not less than five miles per hour, it is perfectly apparent that the train could not have been over thirty or forty rods south of the crossing when the plaintiff was at the point eight or ten rods east thereof, where he says he looked for the train. The plaintiff's eyesight and hearing were good at that time. We think the plaintiff's own evi-

dence demonstrates that he did not look for the train at any point while he was approaching the crossing. True, he says he did, but when it is shown beyond any question that, if he had looked, he could not have failed to see the train, there is no conflict in the evidence which will take the case to the jury. *Reeves v. Dubuque & S. C. Ry. Co.*, 92 Iowa, 35; *Bloomfield v. Railway Co.*, 74 Iowa, 607.

The plaintiff drove toward a known danger with his back toward the source of such danger. He never looked for a train, though he knew that one was due at about that

time, nor did he attempt to look until the  
4. SAME. action of his horses indicated that they had discovered an approaching train, and even then he did not take the trouble to know whether it was a train or something else that had frightened his horses. He was approaching a railroad crossing with two separate teams in charge, without paying the least attention to the danger that is always present at such a place, and we think he was guilty of contributory negligence as a matter of law. The case falls within the rule announced in *Wilson v. R. Co.*, 150 Iowa, 33; *Rietveld v. Railway Co.*, 129 Iowa, 249; *Crawford v. Railway Co.*, 109 Iowa, 433; *Swanger v. Railway Co.*, 132 Iowa, 32; *Artz v. Railroad Co.*, 34 Iowa, 153.

This is not a case where the plaintiff's attention was momentarily diverted so that he did not realize the dangerous position he was in. He testified that he had just started to look for the train as the team  
5. SAME: negligence: sudden emergency. behind the wagon started around the end thereof, and that he was prevented from looking by the unexpected action of both teams. It was an emergency, then, that prevented his looking for the train at the point two or three rods from the track, and this emergency was undoubtedly caused by his own negligent act in driving so close to a dangerous place without looking for the train. It is a general rule that, where an emergency is brought about by the person injured negligently

placing himself in a position of peril, he can not recover. 29 Cyc. 522, and cases cited.

Appellee's contention that the doctrine of last clear chance should be applied here can not be sustained. The engineer did see the plaintiff when he was eight or ten rods east of the track, it is true, but he had the right to suppose that plaintiff would exercise reasonable care and not drive onto the track ahead of the train, and, when he discovered that he did not intend to stop, it was then too late to prevent the collision. *Wilson v. Illinois Central R. Co., supra.*

For the reasons pointed out, the court should have directed a verdict for the defendant. The case is therefore —*Reversed.*

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M. UNDERWOOD, Appellee, v. OSKALOOSA TRACTION AND LIGHT Co., Appellant.

**Automobile accident: CONTRIBUTORY NEGLIGENCE: EVIDENCE.** The evidence in this action is reviewed and held to show that plaintiff, the driver of an automobile which collided with a street car, was conclusively negligent in approaching the crossing, and that a verdict should have been directed for defendant.

**Same: LAST CLEAR CHANCE: SUBMISSION OF ISSUE.** Where an automobile accident was clearly the result of the driver's negligence, and he was in no apparent peril up to the very moment of collision with a street car, when the accident was unavoidable, and there was no evidence that the motorman knew that plaintiff's attention was diverted, there was no basis for submission of the action on the theory of the last clear chance.

**Appeal: RESERVATION OF EXCEPTIONS: MOTION FOR NEW TRIAL.** Where defendant moved for a directed verdict at the close of plaintiff's evidence, and again at the close of all the evidence, and requested several instructions asking for a directed verdict because of insufficiency of the evidence, saving proper exceptions to the court's adverse rulings, the sufficiency of the evidence was reviewable on appeal although no motion for a new trial was made.

*Appeal from Mahaska District Court.*—HON. JOHN F. TALBOTT, Judge.

WEDNESDAY, OCTOBER 16, 1912.

ACTION for damages resulting from a collision of plaintiff's automobile with one of defendant's street cars. There was a verdict for the plaintiff for \$108, and the defendant appeals.—*Reversed.*

*John F. & Wm. R. Lacey*, for appellant.

*McCoy & McCoy* and *S. V. Reynolds*, for appellee.

EVANS, J.—The accident in question occurred on September 6, 1910, at 4 p. m. on one of the principal business streets of Oskaloosa, known as High avenue. This avenue extends east and west, and the street cars are operated upon it. The plaintiff in his automobile approached the avenue at right angles over C street. High avenue is eighty feet wide, and the street car track is laid upon its center line. C street is sixty-six feet wide. The structures on C street prevented a view east or west on High avenue, except upon near approach to its crossing. Arriving at the C street crossing on the north line of High avenue, there was nothing at the time of the accident to obstruct a clear view of High avenue either east or west. The street car in question was coming from the west. The collision resulted from the failure of the plaintiff to observe the street car. He so failed because his attention was directed in another direction, and he was looking backward, instead of forward. The petition charged various specifications of negligence on the part of the defendant, viz., that the car was operated at a reckless rate of speed; that no gong or bell was sounded; that the motorman was old and incompetent; that the car and its equipments were old and out

of repair; that the motorman was negligent in failing to stop the car after discovering the peril of plaintiff, and in failing to discover such peril in time to stop the car. The trial court withdrew the specifications in relation to the competency of the motorman and the condition of the car. The other specifications were submitted to the jury.

It is the contention of appellant that the evidence did not warrant a submission of the case to the jury at all, and that a verdict should have been directed for the defendant. We give our first attention to this question. The plaintiff testified as follows:

I was running south on C street when I came to within about sixty feet of the north line of West High avenue. I saw a man on the crossing going east. When I first noticed him, he was directly in front of me. I called out to him to call his attention so he could see I was coming. Instead of quickening his speed, he rather slowed up. I went past him, and, as I passed, I turned and looked over my left shoulder, but he still kept moving on, but seemed to be muttering something. As I drove by him, I had slowed up considerably, so that he would have time to get out of my way. His peculiar actions drew my attention to him, and, when I turned my eyes in front, I was right on the street car line, and the street car was very close to me. I did not have time to quicken my speed, and it was too late to shut down. I had heard no gong or bell sounding. If I had heard a bell, I would have turned to the east or west; or stopped my car. I could have turned either east or west. I could have stopped easier than anything else, as I was running slow. I was running about ten miles an hour. I had been looking towards High avenue until this man attracted my attention. When I first saw the street car, it was right close to me, and my front wheels were close to, if not on the street car line. The street car was virtually on me when I first saw it. I had a clear track in going into High street. I was going south on C street, which crosses High. When I first saw the fellow in my way, he was fifty or sixty feet from me. He was coming east down the High street sidewalk. He was

1. AUTOMOBILE  
ACCIDENT:  
contributory  
negligence:  
evidence.



going east on High street. He was in the crossing when I first noticed him, and I was then running about ten miles an hour. He turned and commenced to talk. I could see from the way his mouth worked and his peculiar actions that he was not pleased. I understood from his muttering that he was not pleased with my actions. When he started in front of me, I slowed up and gave the alarm. I supposed he would quicken his speed, but he slowed up, and I slowed up and probably down to eight miles an hour. If it had not been for the trouble with this man, I would have seen the car, but he was making a disturbance and attracted my attention. He followed me down after the accident. I rather think he was drunk. He caused me to slow up. His action caused me to look at him, rather than to see whether the street was clear or not. If I had seen the car, I probably would have stopped, or I could have turned either east or west and missed it. This drunken man attracted my attention until it was too late for me to turn. When I got through with him, the car was right on me.

Plaintiff's witness Parks testified on cross-examination as follows:

There was nothing to obstruct the view of anybody in the auto from seeing or anybody from seeing the auto; nothing to obstruct the view of the street car; nothing to prevent Underwood from turning to east or west in the street if he had been looking. He may have been looking at this man. They came together quick, and it was all done. Underwood could have turned either to the right or left. I do not remember hearing the gong sounded. There was nothing to attract my attention either to the street car or the auto. I saw the car going east and the auto going south. The auto did not turn either right or left, but ran straight at the car. I think the car hit it. Both of the heads came together. The southwest corner of Underwood's machine struck the northeast corner of the car. The fender was knocked to one side.

Plaintiff's witness Dobbys testified as follows:

I think the car was running seven or eight miles an hour. Underwood was coming at a fair gait. The street

car was running faster than Underwood. The motorman did nothing, that I noticed, to slacken the speed of the car. There was no obstruction west of C street to obstruct the view from the platform of the car.

Other witnesses testified for the plaintiff in substantial consistency with the foregoing. There was no evidence of any reckless or undue rate of speed on the part of the street car, nor evidence of any other negligence, except the alleged failure to sound the gong or bell.

It is undisputed that the plaintiff could not have failed to see the approaching street car if he had kept his face to the front instead of to the rear. His car was under control. He had a space of forty feet after entering High street to turn either to the east or west. There was no excuse for his looking over his left shoulder except the merest curiosity. He was confronted with no emergency, real or apparent, which caused him to do an act so reckless. The case presented is one of simple and conclusive negligence on the part of the plaintiff.

The appellee contends that he was entitled to recover on the theory of "last clear chance." This theory was submitted to the jury by the instructions of the court, and a recovery permitted thereunder. There is no claim of evidence that the motorman actually discovered the peril of the plaintiff, but it is contended that he was in a position wherein he ought to have discovered it. The question was submitted to the jury in this form. The plaintiff was in control of his automobile. It is conceded that he could have turned to east or west or could have stopped. He was in no apparent peril up to a mere moment before the actual collision. It is not claimed that the motorman knew that plaintiff's attention was directed away from his duty. The trial court properly instructed, in substance, that the motorman had a right to presume that the plaintiff would turn east or west or stop until the contrary was apparent. Nothing to

2. SAME: last  
clear chance:  
submission  
of issue.

the contrary was apparent until the automobile was within ten or fifteen feet of the track, when the collision was confessedly unavoidable. There was no basis in the evidence for the application of the "last clear chance" theory. The incongruity of its attempted application is illustrated by another feature of the case. The street car was also damaged in the collision, and a counterclaim was filed to recover such damages from the plaintiff. Now if the defendant could be made liable to the plaintiff notwithstanding plaintiff's negligence on the theory that the defendant's motorman, by exercise of reasonable diligence, ought to have discovered the plaintiff's negligence and peril, as set forth in the instructions to the jury, then, upon the same reasoning, appellant contends that the plaintiff should be held liable to the defendant for its damages because by the exercise of ordinary diligence he also could have discovered the defendant's peril. The logic is quite compelling, and would result in holding each party liable to the other for the respective damages sustained. It is sufficient to say that the plaintiff was not entitled to recovery on the "last clear chance" theory, and that a verdict for the defendant ought to have been directed on the ground that the negligence of the plaintiff clearly contributed to, if it did not exclusively cause, his injury.

II. It is urged by the appellee that the defendant is not in a position to urge the insufficiency of evidence to support the verdict. The ground of such contention is that

3. APPEAL: reservation of exceptions: motion for new trial.

the defendant filed a motion at the close of the plaintiff's evidence; that this motion was overruled; that the defendant thereupon introduced testimony in its own behalf. It is urged that the defendant thereby waived the ruling on the motion, and that it did not file any motion for a new trial. The contention is based upon *Schulte v. Ry. Co.*, 124 Iowa, 194, and *Hanson v. Kline*, 136 Iowa, 108.

But counsel for appellee overlook the rest of the record.

Not only did appellant file a motion for a directed verdict at the close of plaintiff's evidence, but it renewed the motion at the close of all the evidence. It also submitted to the trial court twenty requested instructions, several of which asked for a directed verdict because of insufficiency of evidence. Exceptions to the adverse rulings of the trial court were properly saved. The appellant did not lose the benefit of these exceptions by failing to file a motion for a new trial. Code, section 4106.

The judgment entered below must therefore be—  
*Reversed.*

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J. B. VAN PAPPELENDAM, Administrator of the Estate of MATILDA BRUMAGEM, Appellant, v. ELLA M. THOMAS, ADA M. FRAME, MABEL KITE and C. H. BROWN, Appellees. LIZZIE FOWLER, CORA JUNKINS, J. M. BRUMAGEM and HARRY BRUMAGEM, Defendants.

**Wills: CONSTRUCTION: TRUST ESTATE.** A will devising all of testator's property to his widow, to be used by her in the best manner for the benefit of his children, upon her death the remaining part to be equally divided among his children, and empowering her to do with the property whatever might be for their common interest, created a trust estate for the benefit of the children, with no power of disposition in the widow except in execution of the trust, and her interest in the estate ceased at her death.

**Same.** No particular form of words is necessary to the creation of a trust estate; the fundamental question being the intent of the testator.

**Same: DISTRIBUTIVE SHARE: PLEADINGS.** The heirs of a widow provided for by the will of her husband can not insist on her having a distributive share in the estate, in the absence of pleading and proof that she did not elect to take under the will.

**Same: RIGHTS OF WIDOW: DISTRIBUTIVE SHARE.** Under the Code of 1860, providing that the widow's dower could not be affected by the provisions of her husband's will if she relinquished her rights under the will, an entire failure to make any objection

to a provision for her benefit amounted to an election to accept its terms, and her heirs could not rely on her having a distributive share in the estate.

*Appeal from Lee District Court.*—HON. HENRY BANK,  
Judge.

THURSDAY, OCTOBER 18, 1912.

PROCEEDINGS in probate for an order to sell certain real estate, claimed to have belonged to Matilda Brumagem at the time of her death, in order to pay claims against her estate. Certain heirs of Mrs. Brumagem were made parties to the application, and three of these appeared and filed a demurrer thereto. The surviving husband of Mrs. Brumagem filed a petition of intervention, and one of the creditors also intervened, asserting her claim as such, and also as one of the heirs of the deceased. Defendants moved to strike parts of the second petition and for a more specific statement in the first one. The case was submitted on the demurrer to the application, and this demurrer was sustained and the application to sell dismissed. The administrator appeals.—*Affirmed.*

*John E. Craig*, for appellant.

*W. B. & H. R. Collins*, for appellees.

DEEMER, J.—Nothing seems to have been done with the motions addressed to the petitions of intervention, and the case comes to us solely upon the allegations of the pleading filed by the administrator, as amended; the truth thereof being admitted by the demurrer. These allegations are to the effect that the deceased, Matilda Brumagem, died, intestate, some time in the year 1911, seised of certain real estate (describing it), and that she acquired title thereto through the will of a former husband, J. H. Brown.

It is alleged that this will gave her a fee-simple estate, and that the property should be sold to pay the debts of the deceased. The will relied upon is in words and figures as follows:

Know all men by these presents that I, James Henry Brown of the county of Lee and state of Iowa, feeling the uncertainty of life and the certainty of death and wishing to arrange my worldly affairs in the best possible manner for the benefit of my wife and children, I therefore ordain this as my last will and testament.

1st. That all my honest debts shall be paid.

2dly. That I give all (that remains after said debts are paid) of my property real, personal and mixed to my well beloved wife, Matilda Brown, to be used by her in the best manner for the benefit of our children and whatever of said property that may remain after the decease of my wife shall be equally divided among our children she being fully empowered to do with said property whatever shall best promote their common interest.

Given under my hand this 7th day of February, 1863.  
J. H. Brown.

It also appears that this will was made in the year 1863, and that the testator died during the same year; but the instrument was not probated until May 15, 1899. The demurrer was a general, equitable one, and the question presented thereby is whether or not the named devisee took an estate in the real property, and, if so, the nature thereof. Various other matters, as the right of the widow to elect, are argued, which we do not think properly arise upon the record.

I. The will was evidently draughted by one unskilled in the law and unfamiliar with the proper form for such instruments, and, as usual, we find counsel differing very widely as to the construction to be placed thereon. On the one hand, it is argued that the will gave the devisee an estate in fee simple; and, on the other, it is said that she was merely

1. WILLS:  
construction:  
trust estate.

made a trustee for her children, or at most given but a life estate in the property. That cases, as a rule, give little help in interpreting unskillfully drawn wills is well understood; and the fundamental rule of construction in such cases is to arrive at the intent of the testator. Taking this will by its four corners, it is manifest that testator gave his property to his wife, to be by her used for the benefit of their children; they, it would seem, being the real beneficiaries. He then undertook to provide for the disposition of the property after the death of his wife, saying that it should be equally divided among their children. During life, of course, the widow was given power to deal with the property in such a manner as should best promote their common interest. The expression "their common interest" is somewhat ambiguous. Whether it means the interest of herself and children, or of the children alone, is a matter of some doubt, but whatever the proper construction here it is clear that her interest ceased with her death; for distribution among the children of the entire estate is called for. This could not be done, of course, if she took either an estate in fee, or a base or qualified estate, either in the whole or a part of the property. There are no words of grant disconnected from the limitations as to use. At most it was a devise of the legal title to Mrs. Brown (Brumagem), to be used for the benefit of the children. Save in the execution of the trust, she could not sell the land in any manner, and for a much stronger reason she could not dispose of it by will. This as it seems to us, created a trust estate.

No particular form of words are necessary to the creation of a trust estate. *Quinn v. Shields*, 62 Iowa, 144. And here, again, the fundamental question is the intent of the testator. The most that can be

2. SAME. claimed under any construction is that the wife was one of the beneficiaries of the trust during her lifetime; but this would not, under the terms of the will,

give her an estate of inheritance. That the testator did not intend the benefits to survive her death is clearly apparent from the second clause of the will. In support of our conclusions, see *Meek v. Briggs*, 87 Iowa, 610; *Scott v. Scott*, 132 Iowa, 35; *Conrey v. Murphy*, 154 Iowa, 421; *Powell v. Beebe*, 167 Mich. 306.

II. This, as it seems to us, disposes of the case. But appellant's counsel say that, even if this be a correct construction of the will, still deceased had a distributive share of which she could not be, and was not, deprived by the will. The chief difficulty with this position lies in the fact that no such claim is made in the petition. On the contrary, the plain implication is that the widow elected to take under the will, or to waive distributive share. Moreover, the will speaks from the death of the testator, although not admitted to probate. *In re Bernhard*, 134 Iowa, 607; *Stephenson v. Stephenson*, 64 Iowa, 534; *Otto v. Doty*, 61 Iowa, 26; *Olleman v. Kelgore*, 52 Iowa, 40.

Testator died in the year 1863, and at the time of his death the law with reference to wills and distributive shares read as follows: "The widow's dower can not be affected by any will of her husband if she objects thereto and relinquishes all rights conferred upon her by the will." Section 2435, Code 1860. "One-third in value of all the real estate in which the husband at any time during the marriage had a legal or equitable interest, which has not been sold on execution or other judicial sale, to which the wife has made no relinquishment of her right, shall, under the direction of the court, be set apart by the executor, administrator or heir, as her property in fee simple, on the death of the husband, if she survive him." Chapter 151, Acts Ninth General Assembly. The case, in this aspect, must be decided with reference to these provisions; and it is sufficient to say that there is no allegation anywhere of any objection at any time

3. SAME:  
distributive  
share:  
pleadings.

4. SAME: rights  
of widow:  
distributive  
share.



by the widow to the provisions of the will. At this point the instant case is ruled by *Garrett v. Olford*, 152 Iowa, 265. So that upon no theory can it be found that the widow had any interest in the real property.

None of the many cases cited by appellant's counsel run counter to the views herein expressed. The nearest approach to it is *Bulfer v. Willigrod*, 71 Iowa, 620. That was an action, however, by an heir against her mother, a devisee under the will, for an accounting; and the will there construed expressly provided that the devise was to the widow, to her own use and benefit, as she shall deem best for herself and daughter. The court, among other things, said in that case: "The will confers upon plaintiff no interest either in the property or its proceeds. But, if it could be said that a trust was created in her favor, she clearly could not now maintain an action for the recovery of any portion of the proceeds; for the right to use the property 'for her own use and benefit,' which was conferred upon the widow, has not terminated. There is no provision for its termination in the will."

The case is reasonably clear, and, in our opinion, the demurrer was properly sustained.

The motion to strike appellees' abstract will be sustained.—*Affirmed.*

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CHARLES F. BIRDSALL, MILDRED PAYTON and DAISY BIRDSALL, Appellants, v. G. I. BIRDSALL.

**Wills: CONSTRUCTION: WHO INCLUDED AS DEVISEES.** A will bequeathing the life use of real property, and providing that upon the death of the life tenant the property should go to his children then living and the issue of any child of the life tenant then deceased, did not contemplate children of the life tenant living at the time of the testator's death, but excluded those living at testator's death who did not survive the life tenant.

**Same: REMAINDERS: ACQUISITION OF LIFE ESTATE: EFFECT.** Under the provisions of the will in this case the interest of the remain-

dermen was not vested during the life of the life tenant but was contingent, not only as to the extent of the share to be enjoyed by those who survive the life tenant but also as to the persons who are to take shares in the remainder: So that the remaindermen can not, by acquiring the existing life estate, perfect a complete title in themselves.

*Appeal from Dallas District Court.*—HON. J. H. APPLE-  
GATE, Judge.

THURSDAY, OCTOBER 18, 1912.

ACTION in equity to enforce the specific performance by defendant of a contract to convey entered into between defendant and plaintiffs. Plaintiffs alleged ownership of the property and the tender of a warranty deed constituting full compliance with the contract on their part and the refusal of the defendant to accept. Defendant pleaded in answer, in effect, that the title of plaintiffs was defective, setting out the facts constituting such alleged defect. There was a demurrer to this answer on the ground that the facts stated did not constitute a defense, and this demurrer was overruled. Plaintiffs elected to stand on their demurrer, and judgment was rendered against them, dismissing their petition, and from this judgment they appeal.—*Affirmed.*

*W. H. Fahey*, for appellants.

*W. H. Winegar*, for appellee.

McCLAIN, J.—The property to which this controversy relates is a specific portion described by metes and bounds, of the N. W.  $\frac{1}{4}$  of section 30, township 81 N., of range 27 W., of the fifth prime meridian, in Dallas county, and plaintiffs trace their title through their grandfather, S. G. Bird-sall, who died seised of the entire quarter section, leaving

a will, of which the following is the significant paragraph: "Third. . . . Subject to life estate of my said wife, Martha Maria Birdsall, I give, devise and bequeath to my son, Walter Gilson Birdsall and his wife, Nora Birdsall, the use, control and rents, issues and profits of [describing the real estate], to have and to hold such rents, issues and profits for and during the terms of their natural lives; and at their death, I will, devise and give said quarter section of land and the same shall descend to and be the property of the children of the said Walter Gilson Birdsall, who shall be living at the time, and the issue of any child of the said Walter Gilson Birdsall who may have then deceased." The persons to whom life interests are devised are still living, but by various conveyances and transfers not necessary to be described in detail the plaintiffs, who are children of Walter Gilson Birdsall and his wife Nora Birdsall, have acquired these life interests, and also the interests, whatever they may be, of their brothers and sisters in the portion of the quarter section which is involved in this action, and the question for decision is whether plaintiffs have thus perfected in themselves a complete fee-simple title to the land.

It is not contended for appellants, if we understand the argument in their behalf, that the words, "who shall be living at the time," are intended to describe the children of Walter Gilson Birdsall who shall be living at the time of testator's death; and, in view of the language used in this section of the will, such contention could not reasonably be made. The words, "at their death, I will, devise, and give said quarter section of land," are, of course, not controlling, for they might well be construed as contemplating a present devise of a remainder with right of enjoyment only at the termination of the life estate. But the words "at the time" manifestly describe the devisees as the children of Walter Gilson Birdsall who shall survive him and the issue of any such chil-

1. WILLS: construction: who included as devisees.

dren as shall not survive him. That such description excludes persons who may be living at the death of the testator, but do not survive the life tenant, is well settled by the authorities. *In re Albiston's Estate*, 117 Wis. 272 (94 N. W. 169); *In re Moran's Will*, 118 Wis. 177 (96 N. W. 367); *Smau v. Young*, 109 Ala. 528 (20 South. 370).

It is assumed by counsel on each side that the answer to the question involved in this case depends upon whether the remainder provided for in favor of the children of

Walter Gilson Birdsall, who shall be living at the termination of the life estate and the issue of any children who may have died, is vested or contingent. Abstractly this may not be true, for, if plaintiffs have acquired all the rights by way of life interest, remainder, and reversion, then they no doubt have a complete title, although the remainder may be contingent. But, as applied to the facts of this case, the issue between the parties is practically whether the remainder is vested or contingent, for, if contingent, then plaintiffs have not acquired all such interests. Other children may be born to Walter Gilson Birdsall, and survive him and his present wife, whose interests have not in any way been acquired by these plaintiffs. And some of the living children, brothers and sisters of the plaintiffs, may die before the death of him and his wife, leaving issue, and the issue of such deceased children would have the same interest in the remainder as the children surviving, for they would not take by representation through their deceased parents, but in their own right by substitution. *Taylor v. Taylor*, 118 Iowa, 407; *Whitesides v. Cooper*, 115 N. C. 570 (20 S. E. 295). It is clear, therefore, that in this case, if the remainder devised in the will is contingent, plaintiffs have not a complete title.

Before proceeding further with the discussion of the nature of the remainder devised, we may well notice the argument advanced, that, as plaintiffs in whom are now

a. SAME: remain-  
ders: acquisi-  
tion of life es-  
tate: effect.

consolidated all the rights of the children of Walter Gilson Birdsall as remaindermen have also acquired the interests of the tenants for life, there has been a merger perfecting title in them to the exclusion of children subsequently born or the issue of children now living who may not survive Walter Gilson Birdsall and his present wife. But, while it is true that in general the remainderman may by acquiring the existing life estate perfect a complete title in himself, this is not true, if the merger leaves other interests outstanding. If plaintiffs in their own right and by acquisition from their brothers and sisters have only a contingent remainder, they can not by the acquisition of the life estate cut off others whose rights may be dependent upon the same contingency. The estate in which the merger takes place is not enlarged by the accession of the preceding estate. 2 Washburn, Real Property (6th Ed.) 546; 2 Blackstone's Commentaries, 177; 1 Tiffany, Real Property, 76; 4 Kent, Commentaries (14th Ed.) 99; Minor & Werts, Real Property, section 699; *Archer v. Jacobs*, 125 Iowa, 467.

Coming now specifically to the question whether the devise of a remainder to the children of the life tenant surviving at his death and the issue of such children who do not thus survive creates a contingent remainder, we find the authorities practically agreed, with an exception hereafter to be noted, in the conclusion that the remainder is contingent on account of the uncertainty as to the persons who are to take. It is not necessary here to elaborate definitions of contingent remainders which shall be applicable to all possible cases. It is enough to say that in such a case as that which we are discussing, reason and authority point to the inevitable conclusion that during the continuance of the life estate there is a contingency not only as to the extent of the share to be enjoyed by those who may survive, but also as to the persons who are to take shares in the remainder, and this uncertainty relates, not only to the

possible exclusion of some who during the continuance of the life estate apparently will be entitled to shares, but also to the inclusion of others who at some time during the continuance of the life estate may not be in existence, or may not be apparently entitled to participate in the distribution of the property. For instance, some of the children of Walter Gilson Birdsall may now have living issue. As matters now stand, the plaintiffs and their brothers and sisters have each an apparent prospect of sharing in the remainder, and the present living issue of one of them has no apparent prospect of thus sharing, but, if the parent of such issue should die, then the issue would be entitled to share. To say nothing of the possibility of the birth of other children to Walter Gilson Birdsall and of other issue to plaintiffs and their brothers and sisters, there may well now be persons living who have a contingent interest in the property. Without elaborate citations of authority, it is sufficient to refer to the following as supporting the conclusion that the remainder in this case is contingent, and must necessarily remain contingent until the termination of the life estate: *Whitesides v. Cooper*, 115 N. C. 570 (20 S. E. 295); *Dickerson v. Dickerson*, 211 Mo. 483 (110 S. W. 700); *Smaw v. Young*, 109 Ala. 528 (20 South. 370); *Golladay v. Knock*, 235 Ill. 412 (85 N. E. 649, 126 Am. St. Rep. 224); *Smith v. Block*, 29 Ohio St. 488; *In re Moran's Will*, 118 Wis. 177 (96 N. W. 367); *Howbert v. Cauthorn*, 100 Va. 649 (42 S. E. 683); *Smith v. Rice*, 130 Mass. 441; *Bailey v. Hoppin*, 12 R. I. 560; *White's Trustee v. White*, 86 Ky. 602 (7 S. W. 26); *Jackson v. Everett* (Tenn.), 58 S. W. 340; *Robertson v. Guenther*, 241 Ill. 511 (89 N. E. 689, 25 L. R. A. (N. S.) 887, and note.)

It is to be noticed that by the language of the will in question the condition on which the children or their issue are to participate in the remainder is clearly precedent, and not a condition subsequent. The provision is not that

the children are to take the remainder with a condition that in the event any one of them shall die his interest shall be forfeited, unless he shall leave issue, in which event the issue shall take such interest, but, on the other hand, the condition is expressed directly as a description of the persons in whom the remainder shall vest, and it is to vest in no particular persons until such description becomes applicable by the termination of the life estate. This distinction is concisely stated thus: "If the conditional element is incorporated into the description of or into the gift to the remainderman, then the remainder is contingent; but, if after words giving a vested interest a clause is added divesting it, the remainder is vested." Gray, Rule Against Perpetuities, section 108. And see *Ducker v. Burnham*, 146 Ill. 9 (34 N. E. 558, 37 Am. St. Rep. 135); 2 Underhill, Wills, section 687. This distinction becomes important for the reason that in some New York cases based on the language of a statute, and in some cases in other states decided under similar statutory provisions or on the assumption that the New York cases state the common law, conclusions have been reached which are not in harmony with those heretofore stated as supported by the weight of authority. The so-called New York rule seems to be that, "when there is a person in being who would have an immediate right to the possession of the land upon the ceasing of the intermediate or precedent estate," the remainder is vested. 4 Kent, Commentaries (14th Ed.) 202. While it seems to have been assumed when this rule was first announced in New York that the statute on which it was based was simply a brief statement of the common law rule, that idea has now been definitely abandoned in that state and elsewhere. As a common law definition or description of a contingent remainder it is subject to the qualification that the person in being must be one whose right to ultimately enjoy the remainder is fixed and certain during the pendency of the particular estate. *Golladay v. Knock*, 235

Ill. 412 (85 N. E. 649, 126 Am. St. Rep. 224). This is necessarily involved in the accepted definitions of vested and contingent remainders. 2 Washburn, Real Property (6th Ed.) 508; 2 Blackstone, Commentaries, 168, 169, and note 37, Hammond's Edition. The effect of the New York rule is to convert a condition precedent into a condition subsequent. The fact that this rule is a distinct departure from the common law, although perhaps not originally intended as such, is so clearly pointed out in some recent cases that reference to them is sufficient for present purposes. See *In re Moran's Will*, 118 Wis. 177 (96 N. W. 367); *Smau v. Young*, 109 Ala. 528 (20 South. 370). Notwithstanding the continued recognition of the New York rule in the courts of that state, it has been held there that such a devise as the one before us creates a contingent, and not a vested, remainder. *Purdy v. Hayt*, 92 N. Y. 446; *Hall v. La France Fire Engine Co.*, 158 N. Y. 570 (53 N. E. 513.) The preceding discussion of the so-called New York rule would not have been necessary had it not been for the apparent recognition given to it in the opinion of this court handed down in the case of *Archer v. Jacobs*, 125 Iowa, 467, on which counsel for appellants relies as his sole authority, and reannounced in *Shafer v. Tereso*, 133 Iowa, 342. We have no statute in this state in any way analogous to that on which the New York rule was predicated, and the definition and characteristics of a contingent remainder must be determined by the common law. The question involved in the case before us was in no way considered in the case of *Archer v. Jacobs* and *Shafer v. Tereso*, and what is said in those cases has no application to it save by inference drawn from definitions of contingent remainders there quoted. The language of the will in this case is clearly distinguishable on well recognized principles from that considered in the *Archer* case. In that case the devise was to the children of the life tenant, or, in the event of the death of any of them prior to the termination



of the life estate, then to the children of such of them as should have died, and it was held that the children of the life tenant took a vested interest, subject to the condition subsequent that, if any of them should die, their children should be substituted, and that, if other children should be born, the estate would be opened up in order that they might have their proper share; while in the present case the devise is to persons of a specified description, which by its very terms can not be applied until the termination of the life estate. It is well settled, where the devise is to all persons of a specified class, they take a vested interest, while, if it is to specified persons of a class, the interest is contingent, dependent upon whether at the termination of the life estate there are persons of that class answering the description. *McClain v. Capper*, 98 Iowa, 145; *Shafer v. Tereso*, 133 Iowa, 342; *Purdy v. Hayt*, 92 N. Y. 446; *Jackson v. Everett* (Tenn.) 58 S. W. 340; *Smith v. Block*, 29 Ohio St. 488; 2 Underhill, Wills, sections 864, 865. We find nothing, therefore, in the prior decisions of this court indicating an intention to adopt the New York rule as a correct description of a vested remainder as applied to the facts of this case. As already indicated, the adoption of that rule in this case would cut off not only the rights of children who may hereafter be born to Walter Gilson Birdsall, but also the rights of issue of the plaintiffs and their brothers and sisters who may now be living or may hereafter be born to share in the remainder in the event that any of the living children should die before the termination of the life estate.

The lower court correctly held that the facts set up in the answer constitute a defense to plaintiffs' petition, and its judgment is therefore—*Affirmed*.

LOUISE BOEKEMIER, Appellant, v. WILLIAM BOEKEMIER  
and Others.

**Wills: CONSTRUCTION: LIFE ESTATES.** In the construction of a will the court will give effect as far as possible to every part of the instrument for the purpose of carrying out the evident intent of the testator. By one paragraph of the will in the instant case the testator gave his wife all his property of which he might die seised, and provided in subsequent paragraphs that after her death certain children should receive legacies, the residue to be divided equally between his children. *Held*, that the wife took only a life estate.

*Appeal from Floyd District Court.*—HON. JOSEPH J.  
CLARK, Judge.

TUESDAY, NOVEMBER 19, 1912.

THE facts are stated in the opinion.—*Affirmed.*

*Wm. H. Salisbury*, for appellant.

*J. C. Campbell*, for appellees.

SHERWIN, J.—This action is in equity to quiet the title to certain real estate, and to establish the ownership of certain personal property, all of which belonged to Christian Boekemeier at the time of his death. The plaintiff is the widow of said deceased Boekemeier and she bases her claim to title to the real estate and to ownership of the personal property on the will of her deceased husband. Omitting the parts of the will not material, the remaining paragraphs are as follows:

I will, devise and bequeath to my beloved wife, Louise

Boekemeier, all my property of every kind and nature of which I may die seized, personal as well as real estate, and wherever located.

After the death of my said wife, I will, devise and bequeath to my daughter, Martha Boekemeier, the sum of one thousand dollars (\$1,000.00).

After the death of my said wife, I will, devise and bequeath to my daughter, Maria Achenbach, nee Boekemeier, the sum of three hundred dollars (\$300.00).

After the death of my said wife, I order that the sum of two hundred dollars (\$200.00) be deposited with the Riverside Cemetery Association of Charles City, Iowa, for the purpose that the annual interest thereon shall be applied to the taking care of our family graves in Charles City, Iowa.

The rest and residue of all my said property I will, devise and bequeath to my eight children share and share alike.

I hereby appoint my said wife, Louise Boekemeier, to be the executrix of this my last will and testament, and after my wife's death I appoint my youngest child, Maria Achenbach, nee Boekemeier, to be the executrix of the residue of my property, and I order that both the parties named as executrixs herein shall not be obliged to give any bonds as such.

The appellant claims that all of the property, both real and personal, owned by her husband at the time of his death, was bequeathed to her by the second paragraph of the will, the real estate in fee simple and the personal property absolutely. The appellees contend that the subsequent paragraphs of the will are entitled to the same consideration that is given to the second paragraph, and that from the entire instrument it is clear that the deceased intended to give to his widow only a life estate in both the real and personal property with the remainder to them. The pleadings of the respective parties presented this question alone, and it was decided by the district court on such pleadings. While the second paragraph of the will does not, in express terms, give

power of disposition, if the paragraph stood alone, it would undoubtedly pass an absolute estate in all of the property left by deceased. But was this the intention of the testator? If it was his intention, as disclosed by the entire instrument, then plaintiff's contention is right. If, on the other hand, it is manifest from a consideration of the instrument as a whole that it was not testator's intention to give his widow an absolute estate, but that it was his intention to give her a life estate only with remainder to his children, the judgment of the district court should be affirmed.

The second paragraph of this will is somewhat peculiar in this respect. It gives no express power of disposition, nor does it expressly refer to the use that the devisee may make thereof, and in this respect it is unlike many wills that we have heretofore considered and given effect to such provisions in determining the real intent of the testator. The failure to refer to these matters in said paragraph may rightly be given weight in connection with the other and subsequent paragraphs in arriving at the testator's intention as to what estate plaintiff should take. Every other paragraph of the will is just as concise, certain, and direct as the second. The third, fourth, and fifth make certain positive bequests of such part of the estate as shall remain after the death of the wife, and the sixth just as positively and certainly gives the "rest and residue of all" of testator's property to his eight children, "share and share alike." Nor do these paragraphs stand alone in pointing to the intention of the testator, for the seventh, which names the persons who shall carry out the various provisions of the will, clearly indicates that the wife's interest in the estate was to cease with her death. Aside from the second paragraph, there can not be found in the entire instrument any language from which an inference can justly be drawn that the second paragraph was intended to create a fee in the plaintiff. The language used in the

subsequent paragraphs is direct and positive, and not a precatory word can be found therein. Nor is there any language in the subsequent paragraphs of the will enlarging or adding to the naked devise in the second, as has been found in many cases. Where none of the foregoing qualifications are present, the later clauses or paragraphs of a will are entitled to at least as much consideration and weight as the paragraphs preceding them, and, where all paragraphs may be given effect without doing violence to the intent of the testator, it is the rule that such must be the construction. In order to sustain the appellant's contention, it would be necessary to entirely disregard and nullify paragraphs 3, 4, 5, and 6, and to partially nullify paragraph 7, where executors are provided for.

By construing the entire will as giving to the plaintiff a life estate only, every part thereof is given effect, and the evident intention of the testator is carried out, and that is what the law demands. A general discussion and review of our cases would be of no benefit to any one, for this has been done time and again. This case is ruled by the following decisions: *Hoefliger v. Hoefliger*, 132 Iowa, 575; *Jordan v. Hinkle*, 111 Iowa, 43; *Wheeler v. Long*, 128 Iowa, 643; *Pool v. Napier*, 145 Iowa, 699; *Jordon v. Woodin*, 93 Iowa, 453; *Stivers v. Gardner*, 88 Iowa, 307; *Iimas v. Neidt*, 101 Iowa, 348; *Law v. Douglass*, 107 Iowa, 606.

The judgment of the district court should be, and it is—*Affirmed*.

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W. M. HEALY, Appellant, v. CHRIS HOHN, MRS. CHRIS HOHN, BUTLER & RHODES ET AL., Appellees.

**Specific performance.** Specific performance of a contract is a matter of equity rather than strict right.

**Contracts: PAROL EVIDENCE: VARIANCE.** A condition precedent to the effectiveness of a contract, which does not go to its terms but

to the question of whether there was in fact a completed agreement, may be shown by parol.

**Same:** SPECIFIC PERFORMANCE: CONDITION PRECEDENT. Where a contract to convey real estate was signed in triplicate by the husband alone, with the understanding that the wife was to sign one copy and when this was done the papers were to be exchanged, her signature was a condition precedent to the consummation of the contract, without which specific performance will not be decreed.

**Same:** APPEAL: REVIEW. On an issue of specific performance which is close in its facts some weight will be given the finding of the trial court, although the action is triable anew on appeal.

**Same:** SPECIFIC PERFORMANCE. Where the contract to convey land, all subject to a mortgage and including the homestead, was not signed by the wife and upon request she refused to sign the same, and subsequently the land was sold to others who purchased in good faith, specific performance of the contract was properly refused on the ground that it might be detrimental to the interests of the wife and lead her into litigation.

*Appeal from Webster District Court.*—HON. C. G. LEE,  
Judge.

TUESDAY, NOVEMBER 19, 1912.

SUIT in equity for the specific performance of a contract to convey real estate. The trial court, upon issues duly joined, heard the case upon its merits and rendered a decree dismissing plaintiff's petition. Plaintiff appeals. —*Affirmed.*

*Robert Healy, B. B. Burnquist, and A. N. Botsford,*  
for appellant.

*Mitchell & Fitzpatrick,* for appellees.

DEEMER, J.—The suit is upon an alleged contract in words and figures as follows:

This contract, made and entered into on the 25th day

of January, A. D. 1910, by and between Chris Hohn and Emma Hohn of Webster county, Iowa, parties of the first part, and L. W. Schaffner and W. M. Healy of Webster county, Iowa, parties of the second part, witnesseth: That for and in consideration of the agreements and covenants therein contained and set forth in this contract, the parties of the first part hereby agree to sell and to convey to the parties of the second part, and the parties of the second part agree to buy, the east one-half of the northeast quarter (E.  $\frac{1}{2}$  N. E.  $\frac{1}{4}$ ) of section 13, township 89, range 29, Webster county, Iowa, for and at the agreed consideration of the sum of \$9,900, which sum is to be paid in the following manner: The sum of \$100.00 to be paid on the signing of this contract. The sum of \$1,900 to be paid on or before March 1, 1910, and a note signed by the parties of the second part, payable on or before March 1, 1913, drawing 6 per cent interest, for the sum of \$3,900. The parties of the second part buy said above described premises subject to a mortgage of \$4,000, which they assume and agree to pay. It is further agreed by the parties hereto that the parties of the first part are to pay and discharge all liens, incumbrances, taxes, and interests that are due and payable March 1, 1910, due and levied against the above described land, with the exception of the above mentioned mortgage of \$4,000. It is further agreed by the parties hereto that the parties of the first part are to deliver to the parties of the second part on or before March 1, 1910, a warranty deed and an abstract of title showing good and merchantable title in the party of the first part. [Signed] L. W. Schaffner. W. M. Healy. Chris Hohn.

While the signature of defendant Christ Hohn is not denied, he alleges that the contract never became valid and binding because of a condition to the effect that it should not become effective until his wife signed the same, and this she refused to do. He also alleges that the contract was conditional upon his becoming satisfied with the sufficiency of the unsecured notes of the purchasers, and that upon inquiry he found this sort of security was unsatisfactory, and that he refused to complete the contract. Another part of his pleading was to the effect that the purchasers repre-

sented that the contract would not be binding until his wife signed, and that he signed the same with this understanding and in reliance upon the statements made him, and that there never was any meeting of the minds upon the contract, and that it never became binding. Mrs. Hohn was made a party to the action, and she pleaded that the subject matter of the contract was her homestead; that she did not sign the contract; and that it was of no validity. She also pleaded that the property was incumbered by mortgage in the sum of \$4,000, and that this mortgage should be paid out of the forty acres of land not included in the homestead, and that her rights should be protected. In this plea her husband joined, and he also pleaded the invalidity of the contract because of the homestead character of the land. The other defendants, although purchasers of the land, claim no rights save those possessed by their grantors. Such were the issues on which the case was tried, and the court below found that there never was a completed contract between the parties.

By this appeal that finding is challenged; and it is also claimed that plaintiff is entitled to specific performance of the contract, in so far as the nonhomestead forty acres is concerned, with proper abatement from the purchase price to protect the plaintiff, and, as we understand it, plaintiff is willing to have the \$4,000 made a special lien upon this forty. Plaintiff's chief reliance, so far as the law is concerned, is upon *Venator v. Swenson*, 100 Iowa, 295; *Townsend v. Blanchard*, 117 Iowa, 36; *Donaldson v. Smith*, 122 Iowa, 388; *Bradford v. Smith*, 123 Iowa, 41, and other like cases.

But the issues also raise the question as to whether there ever was a completed contract, and, if so, whether or not a court of equity should specifically enforce the same; specific performance being, in its last analysis, a matter of equity rather than of

1. SPECIFIC  
PERFORMANCE:



strict right. *Malloy v. Foley*, 155 Iowa, 447; *Findley v. Kock*, 126 Iowa, 131.

The primary and fundamental question in the case is: Was there a completed contract for the sale of the land? The trial court found that there was not, either

2. CONTRACTS:  
parol evi-  
dence: vari-  
ance.

because the wife was to sign, or Hohn was to be satisfied with the unsecured note for \$3,900, before the contract was to become effective. That such conditions may be shown by parol is well settled, because they go not to the terms of the contract, but to the vital question of whether or not there ever was a contract between the parties. *Cavanaugh v. Beer Co.*, 136 Iowa, 236; *Foshier v. Fetzer*, 154 Iowa, 147; *Iowa Loan Co. v. Haller*, 119 Iowa, 645; *Venator v. Swenson*, 100 Iowa, 295; *Green Ridge Co. v. Littlejohn*, 141 Iowa, 221; *Sutton v. Weber*, 127 Iowa, 361.

Reduced to its last analysis, these questions are of fact, and plaintiff comes to us with a finding against him on one or the other, or both, of these propositions. We

3. SAME: specific  
performance:  
condition  
precedent.

have examined the record with care upon these questions and conclude that, while there is a conflict in the testimony relating thereto, the evidence is not such as to justify us in disregarding the finding of the trial court. It is agreed that there was talk about the necessity for the wife signing; and the scrivener who drew the contract (plaintiff in the case) evidently thought it was necessary for the wife to sign, or her signature was contemplated, because in drafting the contract he inserted the wife's name, after making inquiry as to her first name. This is a strong circumstance in support of defendant's contention, and, although not conclusive, because, under our law, it might be enforced against the husband without the wife's signature, is entitled to great weight.

Again, the matter of the unsecured note for \$3,900 was the subject of comment between the parties, and de-

fendant undertook an investigation as to whether such paper was regarded as good security by the banks, and, finding that it was not, concluded not to complete the contract. However, he did not give the plaintiff time or opportunity to make satisfactory terms in this respect; and we do not think a finding for defendants on this ground alone could be sustained.

The proposed contract was executed in triplicate, and we are satisfied that all parties understood that defendant was to take one copy, in order to secure his wife's signature, and that after this was done they contemplated an exchange of papers, defendant to turn over the copy upon which he had secured his wife's signature, and to receive from plaintiff the copy bearing the signatures of the purchasers. This was never done, and in our view the trial court was justified in finding that this was a condition precedent to the full consummation of any contract. If it was, then, as the condition was never performed, there was no such contract as a court of equity would enforce. *Sheldon v. Crane*, 146 Iowa, 461.

The trial court had all the witnesses before him and the advantage of their personal presence; and upon an issue so close in its facts as here appears his finding should be given some weight. *Schurz v. Schurz*, 153 Iowa, 187; *Kent v. La Rue*, 136 Iowa, 113; *Bank v. Porter*, 116 Iowa, 377.

II. Aside from this, and assuming that there was a completed contract between the parties signing the same, we still have the question as to whether it should be specifically enforced. Forty acres of the property was the homestead of Hohn and his wife. The wife did not join in the conveyance; nor, so far as shown, did she ever promise to do so. She is entitled to have her homestead protected, and if there had been no mortgage upon the land this might be done, no doubt, by a proper order. But the sale was for a gross

4. SAME: appeal:  
review.

5. SAME: specific  
performance.

sum and not by the acre, and the entire land is incumbered by mortgage for \$4,000. The wife's inchoate interest in the nonhomestead forty acres must also be protected, or, at least, such rules adopted as would protect her therein. It is true that all the land has now been sold; but this is not regarded as controlling, for the reason that these purchasers have no greater right than their grantors here had, and to grant specific performance at this time would greatly complicate the situation and possibly result in harm or misfortune to the wife. The sale of the homestead forty acres to Butler and Rhodes is a complicating circumstance, which should be considered. That sale may be good, although not good as to the nonhomestead forty. If that result should follow, with an outstanding mortgage of \$4,000 on both forty-acre tracts, there would doubtless be further litigation between the parties and considerable confusion in the adjustment of the respective rights thereof. There is nothing to indicate want of good faith in these purchasers. They paid but little, if any, more for the land than plaintiff agreed to pay, and there is nothing to indicate that there was any special bargain in the land at the price which plaintiff agreed to pay. Recognizing the rule that the trial court is vested with a discretion as to whether or not he will, under such circumstances, grant a decree of specific performance, we feel constrained to hold that the case is not one where we should interfere with that discretion. It is not enough to say, in answer to this, that the trial court specifically found there was no contract to be enforced. The other finding necessarily inhered in the decree, and the rule as to discretion may have influenced the finding.

The case, as presented, is not one which justifies our interference. The decree must therefore be, and it is—*Affirmed.*

G. M. BABBITT, Appellant, v. HUGH CORRIGAN, Appellee.

**Intoxicating liquors: NUISANCE: ABATEMENT: DEATH OF PARTY.** The  
1 death of defendant will abate an action to enjoin a liquor nuisance,  
even after an appeal has been taken.

**Same: APPEAL.** Where notice of appeal was served only on the  
2 defendant whom it was claimed maintained a liquor nuisance,  
the appellate court will not save the action as against the prem-  
ises or the owner thereof, after the death of such defendant;  
and especially where the owner was not named as a defendant  
and there was no showing that notice was served upon him or  
that he appeared to the action.

**Same: NUISANCE: ABATEMENT.** Since an action to enjoin a liquor  
3 nuisance is abated by the death of defendant, the liquor on his  
premises can not be adjudged a nuisance and condemned, as  
intent to keep and sell the same in violation of law is an essen-  
tial element of the nuisance, which was eliminated by his death.

*Appeal from Scott District Court.*—HON. WILLIAM  
THEOPHILUS, Judge.

TUESDAY, NOVEMBER 19, 1912.

SUIT in equity to enjoin Hugh Corrigan from main-  
taining a liquor nuisance. Corrigan interposed a demurrer  
in the court below, which was sustained. From such ruling  
the plaintiff has appealed.—*Appeal dismissed.*

*George Cosson, Attorney-General, and Betty & Betty,*  
for appellant.

*Isaac Pertersberger, Thuenen & Shorey, and Henry*  
*Vollmer,* for appellee.

*C. M. Waterman, amicus curiae.*

EVANS, J.—It is charged in the petition that Corrigan is unlawfully operating a saloon in the city of Davenport and that he there sells and keeps for sale intoxicating liquors in violation of law. The prayer of the petition asks for an injunction, temporary and permanent, and for the abatement of the nuisance.

It is now made to appear that after the appeal was perfected, and on September 12, 1912, Corrigan died. For this reason the attorneys of record for appellee ask that the

1. INTOXICATING  
LIQUORS:  
nuisance:  
abatement:  
death of  
party.

action be abated as against Corrigan and that the appeal be dismissed. A civil action does not ordinarily abate by reason of the death of the defendant. Code, section 4150.

On the other hand, a criminal action does so abate, from the very nature of the case. Punishment can not be imposed upon a dead man, nor can penalties be imposed as against his estate. In the case before us, the only relief prayed is injunctive and penal. Death has enjoined Corrigan, and neither this court nor the lower court can add anything to such decree. From the very nature of the case, the court has no further power over the defendant, either to impose punishment or to adjudge his guilt or innocence.

It is urged by appellant that the case should be saved as against the real estate and the owner thereof. But such question is not before us. The title of the case in this

2. SAME:  
appeal.

court names Corrigan as sole defendant. It does appear, however, from the body of the petition, that Elizabeth Koch is the owner of the premises, and relief is prayed against her as such owner, on the ground that she had knowledge of the violation of law by Corrigan. It is not made to appear whether she was ever served with notice, or whether she appeared in the action, or whether she was named as a defendant in the lower court. In prosecuting his appeal to this court, the appellant served notice on Corrigan alone. Manifestly, there-

fore, there is no other party defendant before us. If the plaintiff is entitled to proceed as against Elizabeth Koch, notwithstanding the death of Corrigan, such right can not be affected by an abatement of the action or a dismissal of the appeal as against Corrigan.

It is also urged by appellant that, notwithstanding the death of Corrigan, he is entitled to an order for the destruction of the intoxicating liquors kept by Corrigan on said premises, on the ground that they constitute a nuisance and should be abated as such. Leaving out of view for the moment

2. SAME:  
nuisance:  
abatement.

that such an order would be penal in its nature, it yet remains that such intoxicating liquors could be adjudged a nuisance only in the sense that they were kept by Corrigan with intent to sell in violation of law. So far as the past is concerned, the guilt of Corrigan is an essential element of such past nuisance. If we are precluded by his death from adjudging his guilt, we are likewise precluded from adjudging the nuisance, which is a mere incident to his guilt. So far as concerns the present and the future of such alleged nuisance, there can be none, without an intent on the part of Corrigan to keep and sell in violation of law. Such intent is an essential element of the nuisance, and his death has eliminated it. We reach the unavoidable conclusion, therefore, that so far as Corrigan is concerned, and to that extent, his death abates the prosecution, and that the courts have no further power of punishment over him. Our process can not reach him. See *Williams v. Williams*, 115 Iowa, 520; *Doubet v. Riggs* (Iowa), 112 N. W., 242; *Davis v. Boyer*, 122 Iowa, 132.

For the reasons indicated, it is clear to us that the appeal should be dismissed; and it is so ordered.—  
*Dismissed.*

LORETTA WORRALL V. DES MOINES RETAIL GROCERS'  
ASSOCIATION, Appellant.

**Former adjudication: SUBMISSION OF ISSUE.** In this action for the  
1 wrongful levy of an execution on exempt property, the defendant  
pleaded an adjudication of the question of exemption, relying  
upon a judgment rendered by a justice of the peace. The evi-  
dence tended to show that the cause before the justice was con-  
tinued by agreement of parties, when judgment was entered.  
*Held*, that the issue of adjudication was in the case and that  
the court erred in refusing to submit it to the jury by proper  
instructions.

**Justice of the peace: JUDGMENTS: CONCLUSIVENESS.** The judgment  
2 of a justice of the peace is as conclusive upon the parties, con-  
cerning all matters adjudicated, as that of any other court; and  
where a judgment was entered at an adjourned date agreed  
upon by the parties, even though beyond the statutory period  
for judgment without consent, it is binding upon the parties,  
and they are as effectively estopped thereby as if entered in any  
other court.

**Damages: EVIDENCE: MARKET VALUE.** Where it is shown that there  
3 was a regular and well established market for secondhand goods,  
the measure of damages for the wrongful taking of the same  
was the retail value of the goods in the market and not their  
actual value; for as a general rule actual value can not be shown,  
until it is made to appear that there was no market value.  
Weaver, J., dissenting in part.

*Appeal from Polk District Court.*—HON. HUGH BRENNAN,  
Judge.

TUESDAY, NOVEMBER 19, 1912.

SUIT to recover damages for the wrongful levy of an  
execution on exempt personal property. There was a ver-  
dict and judgment for the plaintiff. The defendant appeals.  
—*Reversed.*

*Graham & Graham*, for appellant.

*J. L. Witmer*, for appellee.

SHERWIN, J.—The defendant had a judgment against the plaintiff and her divorced husband, and caused the issuance of an execution and a levy thereunder on household goods in the possession of the plaintiff. Shortly after the levy made by the defendant, Chase & Co., of Des Moines, caused a second levy on the same goods; process in both of these cases having issued from the same justice court in Des Moines. After both levies had been made, the plaintiff herein, Mrs. Worrall, served notice that she claimed all of said property as exempt to her. This was denied by both the defendant and Chase & Co. Issue was joined on the question of exemption before F. A. Cope, the justice of the peace, before whom the case was pending. A trial was had on the merits, and it was found that the goods levied on were not exempt to Mrs. Worrall. No appeal was ever taken from said judgment. The trial on the question of exemption was completed September 18, 1908, and the justice took the matter under advisement and continued the case until September 21, 1908. On the 21st of September, the case was again continued for a period of three days, and judgment was finally entered by the justice on the 24th day of September. Thereafter the plaintiff herein, Mrs. Worrall, brought an action in equity against Chase & Co., asking that they be restrained from enforcing their judgment against her. That case finally reached this court, and we held therein that the judgment obtained by Chase & Co. against Mrs. Worrall was void for want of jurisdiction in the justice to render it six days after the cause had been submitted to him for final action. *Worrall v. Chase & Co.*, 144 Iowa, 665.

I. In the case now before us, the defendant pleaded former adjudication as to the question of exemption, rely-



ing upon the judgment rendered by the justice of the peace in the proceedings to which we have already referred. There was evidence tending to show that the continuance of the case before the justice from the 21st to the 24th of September was by mutual consent, and the defendant asked an instruction to the effect that if such continuance was agreed upon by Mrs. Worrall and this defendant, and that judgment was on said day rendered against the claim of Mrs. Worrall, it would constitute an adjudication of the exemption rights of Mrs. Worrall. This instruction was refused, and the court did not instruct on the question of a previous adjudication. This instruction, or a similar one, should have been given. The issue of former adjudication was before the court, and there was evidence tending to show that there had been an adjudication, so far as this defendant is concerned, in the trial before the justice.

The judgment of a justice of the peace is as conclusive on the parties as is the judgment of any other court.

2. FORMER ADJUDICATION: submission of issue. *Central Iowa Ry. Co. v. Piersol*, 65 Iowa, 498. And a judgment of a court of jurisdiction is conclusive as to all points and questions adjudicated. *Beh v. Bay*, 127 Iowa, 246; *Reynolds v. Lyon County*, 121 Iowa, 733.

We entertain no doubt as to the jurisdiction of the justice to render judgment on the 24th day of September, if, as a matter of fact, the parties to the action consented to a continuance to that time. It is only where the decision is delayed beyond the statutory period for judgment, without the consent of the parties, that the justice loses jurisdiction to render a valid judgment. See *Iowa Union Telephone Co. v. Boyland*, 86 Iowa, 90. We think it a general rule that parties to an action in a justice court are bound and estopped by their stipulation as effectively as they are in any other court. The statute (Code, section 4522) requiring judgment to be entered within three

days after the cause is submitted to the justice for final action is undoubtedly intended for the protection of litigants, and may be waived without the loss of jurisdiction by the justice.

II. The defendant offered evidence tending to show that there was a regular and well established market for secondhand furniture in Des Moines, and a well established market price therefor. On the other hand, the plaintiff was allowed to prove, over defendant's objections, the actual value of said goods. The defendant asked an instruction to the effect that, if it was found that there was in Des Moines at the time of the levy an established secondhand retail market for used furniture, then the proper measure of plaintiff's damages would be the secondhand retail value of the furniture taken. We think the instruction should have been given. It is the general rule that the value of property is to be established by evidence of what it is worth in the market. *Scott v. Security F. Ins. Co.*, 98 Iowa, 67; *Read v. State Ins. Co.*, 103 Iowa, 307.

Before the actual value can be shown, it must appear that there is no market value. *Lundvick v. Ins. Co.*, 128 Iowa, 376; *Houghtaling v. Chicago G. W. Ry. Co.*, 117 Iowa, 540. That there may be as certain a market value for secondhand goods as for new goods is quite possible, and, where such is the case, such value should govern.

Other errors are presented, but they need not be discussed in view of our reversal on the points indicated. Judgment—*Reversed*.

WEAVER, J.—I concur in the conclusion announced and in the argument of the foregoing opinion except in so far as it is expressed in the second paragraph. I do not agree in its holding upon the measure of damages.

J. R. OWENS, Appellee, v. NORWOOD WHITE COAL  
COMPANY, Appellant.

**Master and servant: NEGLIGENCE: ASSUMPTION OF RISK: EVIDENCE.**

1 In this action for injuries to a coal miner, caused by the fall of slate, the evidence is considered insufficient by a majority of the court to show actionable negligence on the part of defendant, either in failing to furnish plaintiff with a safe place to work, or in failing to warn him of the danger; and also that it is sufficient to show an assumption of the risk; while a minority of the court think it was such as to require submission of these issues. The case is determined, however, on the validity of a prior settlement with plaintiff.

**Same: SETTLEMENT AND RELEASE: FRAUD: MENTAL CAPACITY: EVI-**

2 **DENCE: INSTRUCTION.** In this action for personal injuries defended on the ground of settlement, release and full satisfaction of all claims, the evidence is reviewed at length and it is, *Held*, that plaintiff was mentally competent to understand and realize the nature and effect of the settlement and release executed by him, and in the opinion of the majority of the court there was not sufficient evidence to take the case to the jury on the question of fraudulent representations of defendant's agent, as to what the plaintiff's physician told him regarding the probable duration of his inability to work; and that the court erred in its instructions authorizing the jury to disregard the release and settlement, if it found that plaintiff did not have sufficient mental capacity to understand the nature and effect of the same, as there was no evidence in support thereof.

**Same: COMPROMISE AND SETTLEMENT.** The law favors the settle-

3 ment of controversies, even with injured and necessitous persons, if fairly and understandingly made, and especially where the claim is of a doubtful character, although it will scrutinize the same for the purpose of detecting fraud and wrong.

**Same.** When an injured person has fairly and knowingly settled

4 the damages resulting from the negligence of another, the courts will not interfere simply because he was mistaken in the nature or extent of his injuries.

*Appeal from Polk District Court.*—HON. HUGH BRENNAN,  
Judge.

TUESDAY, NOVEMBER 19, 1912.

ACTION at law to recover damages for personal injury. There was a verdict and judgment for plaintiff, and defendant appeals.—*Reversed*.

*Guernsey, Parker & Miller*, for appellant.

*J. L. Gillespie and Bannister & Cox*, for appellee.

DEEMER, J.—On August 5, 1908, the defendant was, and for some time had been, operating a coal mine in Polk county, and plaintiff was engaged in its service. He was a miner of experience, and at the time in question was principally engaged in attending the pumps of the mine, but at intervals, when his attention was not thus required, he assisted in other work when called upon so to do, and at the time of the injury of which he complains he had gone to the assistance of one Grange, who was the timberman in charge of a mine entry spoken of by the witness as "17." Plaintiff had some experience as a timberman, and was acquainted with the manner in which mine entries in that neighborhood were constructed and maintained. It was the duty of Grange to inspect this entry every day, and especially those parts of the roof and walls not protected by timbers placed for that purpose. As the entry was driven further into the mine, the timbering, so far as any was thought to be necessary, was advanced accordingly for the purpose of maintaining a passage or roadway between the hoisting shaft and the places where coal was being excavated. As the excavation of the entry was pushed forward into the mine, the track on which coal cars were operated was also extended, keeping the end of the track, a short distance behind the face of the coal. Between the end of the track and the face of the coal the roof and walls of the entry were left to the inspection

and care of the miner or miners working at that point; but, so far as the entry was completed and track laid, it was the duty of the timberman in charge to look after the safety of the passage. Wherever the condition or character of the roof of the entry appeared to demand it, protection against danger from falling rock and slate was usually provided by setting up posts on which cross timbers and logs were placed. The existence of a defective roof from which a fall is liable to occur may sometimes be discovered upon visual inspection, and, when more obscure, may ordinarily be detected by tapping or sounding with a hammer or pick. This entry was being extended to the east, and from its side at intervals were turned or opened rooms from which miners dug coal which was loaded upon the cars and hauled through the entry to the shaft. Nearest the east or working end of the entry was room known as "No. 7," which was worked by one Murray, and about thirty feet farther westward was room "No. 6," worked by one Owens, not the plaintiff. Prior to August 4, 1908, the work of timbering the entry had been carried forward to a point about halfway between the openings into rooms 6 and 7. From this place the roof was left unsupported to a point thirty or forty feet east of "No. 7," from which point Grange, the timberman, having called plaintiff to his assistance, began to set another series of supports. For this purpose they brought in timbers on a coal car, and under the direction of Grange, they had begun to unload them immediately east of the switch at the turn of No. 7, when a large mass of slate fell from the junction of the roof with the rib or wall of the entry, and plaintiff was caught in the fall and severely injured. He charges that his injury was occasioned by the negligence of the defendant in failing to provide him a reasonably safe place to work, and in failing to properly timber the entry, and that defendant, though having knowledge of the dangerous condition of the entry at that place, failed to warn the plain-

tiff thereof. The defendant denies the alleged negligence on its part, alleges that plaintiff himself was guilty of negligence contributing to his own injury, and that he assumed the risk of the conditions of the mine at the place in question, and is therefore not entitled to recover damages. Defendant further pleaded that, after plaintiff's injury and before this action was begun, the parties had an accounting and settlement, the result of which was that defendant undertook to pay, and did pay to, the plaintiff or for his use the sum of \$136, and that he agreed to accept, and did, in fact, accept and receive, the same in full payment, settlement, satisfaction, and discharge of all his demands and rights of action on account of defendant's alleged negligence, and did then and there, in writing release the defendant from all further liability on account thereof. Replying to said plea of settlement, plaintiff admits the execution and delivery of the written acknowledgment of satisfaction set up by the defendant, but says the same was procured *from him by fraud and misrepresentation*, and he is therefore not precluded or estopped thereby.

I. In view of our final conclusion in the matter, we need only say, with reference to the merits of the case, that there are grave doubts about there being any showing of

1. MASTER AND  
SERVANT: neg-  
ligence: as-  
sumption of  
risk: evidence.

actionable negligence. The majority of the court are inclined to think there was no such showing of negligence on the part of the defendant as to take the case to the jury, and are also inclined to the opinion that the plaintiff assumed the risks and hazards of which he complains. Part of the work which he was employed to do was to assist in timbering the mine, and this he was engaged in when injured. A minority of the court think that these were jury questions and should have been submitted as such. We refer to the matter now for the purpose of showing that in any event there has always been doubt of defendant's

liability and of plaintiff's right to a verdict on the testimony, aside from the question upon which the case turns. This much in preparation for the controlling proposition in the case which we shall now consider.

II. On the 28th day of August, 1908, something more than four weeks after the accident, plaintiff made a settlement with the defendant and executed to it the following receipt and release:

Form 373, 2 M, 607.

I, J. R. Owens, hereby admit and acknowledge that there has been paid to me in hand this day by Norwood White Coal Company the sum of one hundred thirty-six and 60/100 dollars in full settlement, accord and satisfaction of any and all claims or demands of every description which I now have or may hereafter have against the said Norwood White Coal Co. on account of an accident causing injury to me on or about August 5, 1908.

In testimony whereof, I hereunto set my hand and seal this 28th day of August, 1908. J. R. Owens [Seal.]

Witness: C. Woodbridge, Mrs. J. R. Owens.

*Prima facie*, at least, this is a bar to his recovery. He pleaded in his reply, however, that defendant's agent and attorney falsely represented to him that he had no cause of action, and by his professed friendship and false pretenses of sympathy he won his (plaintiff's) confidence and induced him to sign the paper and accept the money, and that said attorney and agent falsely and fraudulently represented and stated to plaintiff that his (plaintiff's) doctor had stated to him (the said agent) that he (plaintiff) would be up and around within six weeks. He further alleged that he had no opportunity to consult counsel with reference to his case, and believing each and all of said statements to be true, and relying thereon, he entered into the contract of settlement which he

2. SAME: settle-  
ment and re-  
lease: fraud:  
mental capac-  
ity: evidence:  
instruction.

would not have done had he known the truth. He also pleaded a mutual mistake of the parties as to plaintiff's legal rights, and asked that the settlement be disregarded, and that the amount paid him be credited on whatever allowance the jury should make on his behalf. The testimony introduced on this issue tended to show that defendant's agent and attorney stated to plaintiff that he had no case, and that he would be a lucky man to take the money offered; that this agent, one Woodbridge, visited plaintiff about August 10, 1908, and had him make a statement of his case, and at the time "he asked Mr. Owens if he knew him, and Mr. Owens said, 'I suppose you are sent here by the company,' and he said, 'That is who I am.' He said, 'My name is Woodbridge,' and he said, 'Mr. Owens, I am going to do all I can for you,' and he says, 'I have gone where they will cuss and swear at me,' and he says, 'You have acted the perfect gentleman, and I am going to do all in my power, and I am going to try and get half of your wages while you lay here.' That was after he had talked with Mr. Owens. Mr. Woodbridge said where he goes they cuss and swear at him some places, and he said the company would rather give it to the lawyers than to give it to the man that cussed him."

The witness who gave this testimony (plaintiff's wife) further testified:

On his second visit Mr. Woodridge came with Dr. Cokenower who had been taking care of my husband. The two drove up together in a buggy. When Dr. Cokenower came in, he brought Mr. Woodbridge to the bed and said, 'Come here, and see that I am not holding this man here any longer than I can possibly help,' and he took care of his back, and put a new drainage in his back, and when Dr. Cokenower said that, Mr. Woodbridge came up and looked at my husband. After the doctor got through dressing the wounds, he picked up his satchel and walked out and sat in his buggy. Mr. Woodbridge then sat on a



chair alongside of my husband and told him he had heard from the company that the company had allowed him \$75 all told, but he said, 'Mr. Owens, your hurt is deeper than I thought it was; I will do better than that on my own responsibility. I will give your hospital bill and doctor bill, and give you \$50.' He said, 'Wait a minute and I will go and see the doctor as to how many trips he will have to make,' and he went out and came back and said, 'The doctor said he would have to make two or three more trips.' When Mr. Woodbridge came back in from the buggy he said, 'Your doctor bill is now close to \$75 and he will have to make two or three more trips, and that will bring it close to \$100. He charges \$5 a trip.' My husband said, 'Well, I will think about it; I will think it over.' My husband was not then able to walk around. He could not move himself at that time. Mr. Woodbridge said, 'All right, you think it over, and if you decide on doing it, I will leave you my phone number, and you can call me up.' My husband asked him if he could not give him half his wages that he was getting, and he said, 'I can not do that because the doctor says you will be out of here and at work in six weeks.' Mr. Woodbridge said that after he had stepped out of the house and went to Dr. Cokenower's buggy. I could not hear what Dr. Cokenower said to Mr. Woodbridge. On this second visit, Mr. Woodbridge said to my husband that he had no case whatever; that he was an attorney himself, and was going to do all he could for him; that he had got word from the company, and that they had looked it up thoroughly, and he had looked it up thoroughly, himself, and he would take it on his own shoulders and give us more than the company allowed, and he said we had no case whatever. He said he was an attorney and claim agent. He said he had had experience as a claim agent for a long time, and had been out where people had been hurt in the mines. On that second trip my husband did not accept Mr. Woodbridge's offer. Mr. Woodbridge picked up his hat off the stand and started out and said, 'If you decide to do it, you can call me up,' and he left his phone number. After Mr. Woodbridge left, my husband and I talked over his offer. My husband has no education. During our married life he has done nothing but mining and timbering in the mines. Mr.

Woodbridge came to our house again when I phoned for him. We decided to take the \$50 and have him pay the hospital bill and doctor bill. We thought if my husband got out and at work in six weeks we were doing pretty well, and my husband said, 'All right, you go and phone for him, and we will take it,' and I went and phoned. Mr. Woodbridge came when I phoned him. He was out there before I had time to get over from the home. Mr. Woodbridge came in and said, 'Mr. Owens, you are a lucky man, because you have no case whatever, and you are lucky to take this; you had better take this than to have nothing.' . . . I took care of Mr. Owens from the time he returned from the hospital up to the time Mr. Woodbridge made his third trip. Mr. Owens could not move himself. I had to move and help him. When I went to lift him or take care of him he would scream and holler with his leg. He could not be moved at all. He was in that condition at the time Mr. Woodbridge made his third visit. Mr. Woodbridge was out the second time on Monday, and it was either Thursday or Friday of the same week that he came out the third time and settled. It was either three or four days after the second trip that he settled up, on the third trip. Dr. Cokenower had not been at the house between those two trips of Mr. Woodbridge. He came the same day right after Mr. Woodbridge left. Up to that time Mr. Owens had not talked with any business man or lawyer about his case. Mr. Owens was in bed all the time. Mr. Woodbridge told us that if we went and got lawyers to see about it their lawyers would beat us out of it anyhow. That was on the second trip. . . . There were twelve days from the time he was hurt that he never moved a limb or shut an eye to sleep, and it was all of six weeks before he could use his limbs at all. He had not done any work since he was hurt.

This witness further testified on cross-examination:

It was during his second visit that Mr. Woodbridge first proposed to pay my husband \$50 and the hospital and doctor bills. It was on that second visit also that he told my husband that he had no case against the company. My husband was in bed, and I was in the same room and heard the conversation. My husband did not accept the offer at

that time, but said he would think about it. Q. And then that was on Monday and your husband thought about it until Thursday or Friday? A. Yes, sir. He talked it over with me and decided to accept the proposition. We accepted it on Thursday or Friday, and the money was paid at our home, 854 Boyd street, in East Des Moines. . . . My mother and father live just across the street. My father was at the house when Mr. Woodbridge came over the second time. He was in the room and heard this conversation. One of the neighbors right across the street had a telephone. I used that telephone when I phoned for Mr. Woodbridge on the day he came and paid us. During the days of the week before he paid us I was taking care of Mr. Owens. It took most of my time. I could have gone over to my father's house during that time, had I wanted to. I went to the telephone myself and talked to a lady in Mr. Woodbridge's office. I was not at the telephone before during that week unless I phoned for the doctor. Oh, I did not phone for the doctor that week. He did not come out from the time Mr. Woodbridge was there the second time until Mr. Woodbridge came and paid the money. The doctor came right after Mr. Woodbridge went away. If I had had occasion to telephone, I could have done so any day that week. Neither Mr. Owens nor myself talked with my father about this settlement. We did not talk with any one. Did not call up any lawyer or talk to any lawyer about it. Mr. Woodbridge told us it would do no good to talk to a lawyer because we had no case whatever, and if we went and hired a lawyer that their lawyers—that is, his company's lawyers—would win the case for the company. That is about all he said about that matter. He tried to give us to understand we had no case, and that therefore we had better settle. We did not call up any business man or talk with any business man about settling. I did not go to the store during that week before the settlement. I could have gone, but I had no occasion to go. I was present when the settlement was made, and saw the receipt signed by my husband. He signed his own name to it. He can read and write. He can and does read the newspapers. He was not delirious or out of his head at all during that week before the settlement that I know of. When he was talking about this matter of this settle-

ment and about other matters he talked rationally as though he understood what he was talking about. He did not get out of his head at all. He was suffering agonies, but when he talked about things he talked sensibly as he ordinarily did.

And on re-examination she gave the following testimony: "I did not have any talk with Dr. Cokenower over the phone during that time between these two visits of Mr. Woodbridge. I did not try to have any talk with him. I never asked the doctor about this statement of Mr. Woodbridge's as to how long my husband would be disabled. I never thought about asking the doctor about what he had told Mr. Woodbridge."

Plaintiff himself gave this version of the matter:

They took me from the mine to my home and from there to Mercy Hospital. I remained in the hospital about four days. Went there on the 5th and left on the 9th, and after that stayed at home. They took me home in the ambulance. I was not able to sit up in a chair and be around when they took me home. I got home on the 9th, and on the 10th Mr. Woodbridge was there early in the morning. He came alone. . . . At the time Mr. Woodbridge came to see me, I was suffering untold pain. I was suffering with my kidneys and back, clean up to the back of my head here—all kinds of pain—and I was suffering in this knee here. It was fractured and swelled all up and gave me all kinds of pain. Most of the time I laid flat on my back. I could not stand sitting up too much. I could move the right limb a little, but the left I could not. I did not sleep well at night. I never slept at all for twelve days and twelve nights after I was hurt for the simple reason I was in all kinds of misery and my nerves were all shattered. When Woodbridge came to see me on the 10th of August he asked me how I felt. I told him very poorly. He said, 'Yes, I guess you do.' He says, 'Who does your doctoring?' I says, 'Dr. Cokenower,' and he said, 'I know him well; he does our doctoring.' He got to asking me how I got hurt, and I commenced to tell him the best I knew how, and he took out a pencil and paper and com-

menced writing down. He was sitting down in the chair. As I talked to him he would keep writing it down. I told him everything he asked me. I answered his questions as near as I knew how. After he had finished writing, he did not read the paper to me. He did not hand it to me to let me read it. He just stuck it in his pocket. I do not remember whether he got me to sign it or not. I do not remember whether I signed it or not. Q. Now did he mention anything about a settlement on the first trip? A. Why he said that I had acted a perfect gentleman with him, and that he was going to do all in his power to help me along. He was going to try to get me half of my wages. In most of the cases people was cursing and swearing around, and if they took the case to a lawyer and took it to court, why their lawyers would generally beat them. He did not advise me to go and consult a lawyer. He said if I went to see a lawyer I would be beat anyhow. He did not say who he was until he got everything wrote down, and then asked me if I knew him, and I said I did not unless he was a man sent there by the company, and he said, 'Yes,' he was sent there by the company. I believed these things that he told me because he was a lawyer and I was not. I had confidence in what he told me on that visit. He came again in about two weeks with Dr. Cokenower. I was still in about the same condition. I was suffering pain; suffered all that day because he went and put a drainage in my back while he was standing there looking. Dr. Cokenower and Woodbridge came into the house together. Dr. Cokenower said, 'Step up here and I will show you that I am not holding this man in bed any longer than I possibly can,' and he took the bandage off and started to work on my back, and called Mr. Woodbridge's attention to my back. He was where he could see it. After the doctor got through bandaging my back, he said, 'I will step out, Mr. Woodbridge, to the buggy, and you can go ahead and do your talking, and I will wait for you.' Woodbridge stayed in the room. Woodbridge said he had consulted with the company. They had found out that I had no case whatever, and he himself was an attorney, had been in the business a good many years, and had handled such cases as mine and found out that I had no case whatever. He said he had heard from the company, and they claimed I had no case.

He made an offer of settlement at that time. Woodbridge said the company had authorized him to give me \$75 all told, but the condition I was in he would do better. He would make it better. He would take the responsibility on his own shoulders. He would pay my hospital bill and doctor bill and give me \$50. He said he would take that upon his own shoulders. He mentioned that the doctor's charges so far were \$75, and he said, 'I will step out and see the doctor and see how many more trips he has to make.' He left the room and stepped outside, and after awhile came back. He said, 'The doctor said he would probably make two or three trips yet.' That would bring the doctor bill up to \$90 or \$95. He said that the doctor said I would be up out of bed and at work in six weeks. He asked me if I was going to take the money. I told him 'No,' I would not do it, I would study over the matter. He said I had better take the money because I had no case to fight on whatever. He said if I would take it then, and after I got to studying over the matter he left his telephone number with me on a card and said, 'When you come to decide to take it, phone down to me and I will come right direct up.'

. . . After Woodbridge left after the second trip, my wife and I discussed over the amount he wanted to give me. We decided that we had better take that than to get nothing at all. We could live on that \$50 anyway, and by that time probably I would be able to be out and get to work again. I did not know how bad I was hurt. I supposed the doctor knew his business. Three or four days after Woodbridge's second visit, my wife telephoned him to come. He came. That was his third trip. He said, 'Mr. Owens, you are a lucky man that you sent for me to accept this money.' He said, 'You have no case at all.' He said, 'Furthermore, you will be out of bed in six weeks and at work.' I believed what he told me on that third trip, and relied on that in making the settlement and taking the money. He paid me \$50. He said the doctor bill would be \$90 or \$95. I knew what the hospital bill was. It was around \$15.50 or \$16. Q. You never paid the doctor bill or hospital bill? A. No. Q. Do you know whether he did? A. Yes, he did. Up to the time I made the settlement with him and signed the release and took the money, I relied upon all the statements made by Woodbridge to me. I

would not have made the settlement and taken the money had he not made those statements. I did not distrust him. . . . I recognize my signature to the paper marked 'Exhibit 3.' That paper also bears my wife's signature. I saw her sign it there. I saw my wife sign it, and I signed it. I can read the paper Exhibit 3, both the written and printed parts of it. I do not have much difficulty in reading it by taking my time to it. The printed part of it is large and clear. Exhibit 3 bears date August 28, 1908. I believe that is the date when I signed it. Mr. Woodbridge did not hand Exhibit 3 to me. When I signed it, it was off of the bed on a chair. I was lying on my back. I do not know whether the written parts were filled in it or not when I signed it. I did not see whether it had my name, J. R. Owens, written at the top, nor the words 'Norwood White Coal Company.' I could not swear whether those things were written in or not. I suppose the sum \$136.61 was written in there at the time I signed it. I have no reason for thinking that those things were not written in there at the time I signed it. I have no doubt but that the written parts of Exhibit 3 were all in it when I signed it. Q. That is what you were receipting for? A. I signed it, yes. Q. For the injuries you received August 5, 1908? A. For the money I received from him. . . . This settlement was made on the 28th day of August. Mr. Woodbridge did not read over the release, Exhibit 3, to me. I did not ask him to. My wife did not read it to me. I did not ask her to. I got the benefit of the whole \$136.60 in settlement. He did not frog me on that part of it. I did not try to read the receipt myself that day. There were three or four days intervened between the time when Mr. Woodbridge offered to make this settlement and the day it was made. At the time Mr. Woodbridge made the offer and I told him I would think it over, my father-in-law was present. He heard Mr. Woodbridge's offer. I did not talk it over with my father-in-law at any time, but I talked with my wife. My father-in-law was an old coal miner. He was an old hand at it. . . . I never did talk that matter of settlement over with my father-in-law. That was my business. I thought I was treated right and that I had a friend. I thought Mr. Woodbridge was my friend. Yes, I knew he was representing the company and was



looking after its interests. I did not know that he was trying to get out of the matter so that it would not cost the company a great deal of money. I guess my common sense did not teach me that. He said he was a friend of mine and he was going to do everything possible for me. I had never seen him before he came out there on the 10th of August. Never had any acquaintance with him before that. On that day he was there probably an hour and a half. That was the time when he got this statement signed up. About all that was done there that time was his writing down this statement and then leaving. He did not make any offer of settlement the first day. He came out there again two weeks afterwards. That time he came with the doctor. He was there probably half or three-quarters of an hour, and about twenty minutes of that time the doctor was not in there. The next time I saw Woodbridge was the time he paid me the money. I suppose he was there about fifteen minutes before I signed this receipt. These were the only times I had ever spoken with Mr. Woodbridge. These were the only times that I had ever seen him in all my life. I knew he was a representative of the company, and was representing the company's interests. That was the extent of my friendship and acquaintance with Mr. Woodbridge. Yes, I knew that this was a receipt in full. I knew that it didn't leave me any right to claim anything against the company. I accepted this at that time as a full settlement on account of the injuries that I had received. That is what I intended to do at that time. He said I had no case. There were three or four days intervening between the time when Woodbridge made me the offer and the time I accepted it and signed the receipt. Those days were along the 24th, 25th, 26th, and 27th of August. Dr. Cokenower was not there to see me during that time. I heard him testify that he was out here during that time, but he was not. I heard him swear that he was. I did not at any time ask Dr. Cokenower what he thought about when I would be able to get up and go to work. I never asked him the question. I was not curious to know what he would say about it. I never got my wife to telephone him about it. Never sent my boy to see him and ask him that question. I never made any effort whatever to inquire of Dr. Cokenower himself as to how long I would probably



be disabled. There was nothing to prevent me doing so. At the time of the settlement I had heard of other men being injured and bringing suits to recover damages. I knew that there was such a thing as a court and jury to try that kind of case. I knew that sometimes the verdicts were one way and sometimes the other. Q. And so, when Mr. Woodbridge told you that you had no case you knew he was simply expressing his opinion about it, didn't you? A. No, he said he looked it up. Q. You knew the other side might look the other side up? You knew some one might look your side up, didn't you, if you had asked them to do it? A. I believed what he said. I knew I could get a lawyer to look up my side of the case, but I did not do it; did not try to do it. There was nothing to prevent my wife telephoning a lawyer. Nothing to prevent me sending for one. I had all the opportunity in the world between the time Woodbridge made the offer and the time he paid me the money, if I wanted to. There was nothing to prevent my doing so. I had had a physician in my family before this. Some one called Dr. Cokenower this time when I was hurt. He was my family doctor, and he had been before that. I do not know who called him this time. . . . Q. Did you talk with Dr. Cokenower between the second and third trips? A. No, sir. Q. What, if anything, prevented you from consulting a lawyer about your case before you settled? A. Well, Mr. Woodbridge said, if I went and consulted a lawyer and brought it into court, their attorneys would beat me anyhow, so I did not see that there was anything for me to do. I did not think that there was any necessity or use of seeing a lawyer. I was on my back in bed. My wife was there in attendance on me. My mother-in-law would come over sometimes and my sister-in-law would come in and help take care of the children. We had no nurse.

This is practically all of the testimony as to the inducements offered plaintiff to settle and to prove their falsity. Plaintiff, of course, claims that his testimony made out a case against the defendant, and he introduced testimony showing the nature and extent of his injuries, which were in fact serious and doubtless permanent, and

in addition to that he produced Dr. Cokenower as a witness. Dr. Cokenower who, it is conceded, was plaintiff's physician, and in no manner represented the defendant, nor was he employed by it, testified substantially as follows:

I remember Mr. Woodbridge riding out to Mr. Owens' place in the buggy with me one day. After I got through attending Mr. Owens, I went out and got in the buggy. Mr. Woodbridge came out with me, but later went back into the house. Q. Did you, when Mr. Woodbridge came out from the house, tell Mr. Woodbridge that Mr. Owens would be up and at his work in six weeks? A. I did as far as the hematoma was concerned, unless some new complications arose. Q. Tell what you told Mr. Woodbridge when he came out from the house. A. Just as I stated then. Q. Did you ever tell Mr. Woodbridge or any one else that Mr. Owens would be up and at his work in six weeks? A. No, sir. I might qualify that, just as I did before, that so far as the tumor was concerned he ought to be over that in six weeks unless some complications arose or new developments, because this was before the six weeks was up that I stated this, and any one to make a statement that a person would be able to go to work after the injury at a specified hour, he was certainly ignorant or dishonest. That would be all I would say, I do not care who he would be. . . . I could not say positively how many visits I made to Owens' place in company with Mr. Woodbridge. It would be guesswork. I recall the occasion of his asking me as to the probable period of time during which Owens would be disabled, as that was the only occasion when he returned to the house. I have a record of my visits to Mr. Owens. I would say that my statement to Mr. Woodbridge was made more than two weeks prior to the termination of the six weeks from the date of the injury. That would make the statement of Mr. Woodbridge about four weeks after the injury. I made a number of visits after that. Four or five days after that I visited Mr. Owens again. I stated to Mr. Woodbridge at that time what I thought with reference to the prognosis or outlook for his man Owens. Q. What was it you said, just repeat that? A. I said that so far as the tumor was concerned that it ought

to be well in six weeks unless complications arise or something else develops. Q. Were you at that time, at the time you made that statement, anticipating any complications? A. I was not although I know that there was some trouble with the hip, but I did not know just exactly to what extent or how long it would be. I recognize the writing, Exhibit 1, as being in my handwriting. That is the report I made as attending physician in Mr. Owens' case to Mr. Woodbridge. The written words in Exhibit 1, 'disabled about six weeks, mostly from left thigh,' after the printed words, 'future prospects,' are in my handwriting. That was my judgment of the probable future prospects of Mr. Owens' injury at the time I made that report. I do not remember the date when I made out the report Exhibit 1. That report, Exhibit 1, was my professional judgment of Mr. Owens' condition at that time. The fact that the report, Exhibit 1, is not signed by me is the result of oversight. I am ready to stand for the statements the same as though the paper had been actually signed by me. Every statement that is made there was true at that time, but that was before the six weeks had expired. . . . There were no bones broken or fractures in Mr. Owens' case. There was no complete dislocation. There was an injury to the hip, but the swelling was so large that it was not dislocated but simply damaged. I have no record of a visit to Mr. Owens after the 31st of August. I took care of him as long as I deemed it necessary. I then discharged him as a patient, simply because I thought all that he needed was rest and quietude, and that he could get without my presence. . . . This statement, Exhibit 1, was not made before Mr. Woodbridge made his last visit with me to Mr. Owens, nor was it made before he took his first trip with me. The statement was made after he had made his last trip there with me. This journal, from which I have taken the dates of my visits, is in my handwriting.

The exhibit referred to by the doctor was his report as surgeon, which is in the following language:

#### Surgeon's Report.

Case of J. R. Owens, residence, 854 E. Boyd St.  
Injury at Norwood mine.

Date of accident, Aug. 5, 1908; examination, Aug. 5, 1908.

Physician, James W. Cokenower.

Diagnosis, lumbar blood tumor, 3 pints, due to injury, bruised left thigh and hip and right knee.

Prognosis, favorable.

Age, 39 years; weight, 140 lbs.; height, 5 ft. 7 in.

Previous history, negative.

Nature of accident.

Direct effects.

Indirect or subsequent results.

What work since accident.

Examination.

Future prospects, disabled about 6 weeks; mostly from left thigh.

Remarks.

[Sign here] \_\_\_\_\_, M. D.

This is practically the entire testimony introduced by plaintiff in support of the issues tendered by his reply in response to the plea of settlement. Some of it is disputed by defendant's witness, Woodbridge, and with reference to one of the issues he said:

On the 21st day of August I told Mr. Owens the doctor told me he would be disabled about six weeks, and Mr. Owens said, 'I do not believe it.' And I said, 'He is sitting out there in the buggy; call him in here, and ask him,' and he said, 'No; I do not mean I do not believe you when you say he said it, but I think he is mistaken,' and I said, 'I do not know anything about that.' The doctor had told me coming over to Mr. Owens' house in the buggy that he would be disabled about six weeks. I went over to the doctor's office, or started over to get him to make out this report showing the man's condition, and when I got over to the door of the building I met Dr. Cokenower coming out and told him what I wanted and that I was going over there, and he said he was just on his way there, and for me to get in and ride along with him; and on the way over there he told me that in his judgment Mr. Owens would be disabled about six weeks, and when we came back from Mr. Owens' house the doctor went up to his office and filled

out that blank. That was on August 21, the date when I first made the offer of settlement to Mr. Owens. The blank which he filled out was Exhibit No. 1. I saw the doctor make it up. He delivered it to me. I have no knowledge or skill in medicine or surgery, and at the time I made this statement to Mr. Owens I had no knowledge or information of any sort that led me to question or doubt the correctness of the statement that the doctor made me. I only knew what he had told me. The doctor had told me, in substance, the same thing that he afterwards wrote in this report. What I told Owens was what the doctor had told me, namely, that the doctor said he would probably be disabled about six weeks. The day I rode over with the doctor, as he went out he said he would be back Tuesday, as I remember it, and the day I settled with him I asked Owens if the doctor had been there since I was there, and Owens said, 'Yes,' and I asked Owens, 'Did you ask him about the disability?' and Owens said, 'Yes, and he said just as you said, that I would be laid up about six weeks,' and Mr. Owens added, 'I think yet it will be longer than that.'

In rebuttal of this plaintiff testified as follows: "I heard Mr. Woodbridge's testimony. I had never talked with Dr. Cokenower prior to the time of this settlement regarding the length of time I would be sick. Q. How long after you received that money was it that you had any talk whatever with Dr. Cokenower about the extent of your injury? A. It was about four months."

It has seemed necessary to either set out the testimony bearing upon the issues tendered with reference to the settlement in order that the matter may be fully understood or to simply announce our conclusions with reference to the matter, leaving it to the profession to hunt out the testimony in the record in the event it became necessary to know the exact nature of the evidence upon which our conclusion is based. In view of our final conclusion, it is deemed best to adopt the former method in the writing of this opinion.

The trial court in its instructions, with reference to the matters here at issue, said:

(10) If you find from the evidence that, at the time the plaintiff signed the release in controversy, he did not read the same, and you further find he was suffering with pain and that he was mentally unfit to transact business, and that the defendant made use of the statements and representations that he would be well and at work within six weeks from that time, and that the doctor had so informed him, and you further find that the plaintiff was induced by such statement to sign said release, and you further find that the statement, if you find it was made, was not true, and that it was made by the defendant through its agent and attorney for the purpose of inducing the plaintiff to sign said release, and that such statement did induce him to sign such release, then and in that event you would be justified in finding that said release or receipt is void; but, unless plaintiff has so established by a preponderance of the evidence, then said receipt would not be void and would be binding upon plaintiff, and you should return your verdict for the defendant. (11) In considering the question as to whether or not the said receipt was obtained by fraud, you will consider the surroundings and condition of the plaintiff at the time the same was signed, whether he was in that mental condition that he was capable of understanding and realizing the nature and effect of the same, whether defendant made use of any artifice or statements that were untrue and of a nature to deceive and mislead plaintiff, and from these and all other facts and circumstances, that you may find are established by the testimony in the case you are to judge whether or not the release or receipt in controversy is binding upon the plaintiff. And if you find from the evidence that said release was obtained by such fraud, then plaintiff is not bound thereby, and the same is no defense in this case. The statement that plaintiff had no case and could not recover damages from the defendant is merely an expression of an opinion, and would not be the basis of fraud, and you could not so consider it in arriving at the question of whether a fraud was committed. If, under the evidence and the foregoing instructions, you find that said receipt and release is void,

then you will proceed to consider whether or not plaintiff is entitled to recover upon the main branch of the case as set out by him.

By this instruction Woodbridge's statements that plaintiff had no case and could not recover were eliminated, and the jury was confined to but two propositions: One plaintiff's mental incapacity, and the other the representations as to the time within which plaintiff would recover.

These instructions are not entirely clear; but it is manifest we think that a jury would have been authorized thereby to disregard the settlement in the event it found plaintiff did not have sufficient mental capacity to understand or realize the nature and effect of the same. In this respect we think the court was in error. There was no testimony tending to show plaintiff's mental incapacity at the time the settlement was had and the receipt executed. Had the jury been directed to consider plaintiff's mental condition in arriving at the effect which Woodbridge's statements as to the time when he might expect to recover had upon him, there might be some ground for sustaining it. The trouble here is that the plaintiff himself testified that he fully understood and comprehended the effect of the statements and relied thereon with a full understanding of what they implied. He did not excuse his act by saying he was either in want or in pain, or that his condition of mind was such that he did not fully understand all that took place. In submitting this matter to the jury, we think the trial court was in error.

As to the other proposition, to wit, whether or not Woodbridge made any false or fraudulent statements regarding what the doctor told him as to how long he (plaintiff) would be in bed, the members of the court are not agreed. A majority are of opinion that there was not enough testimony here to take the case to the jury. The doctor was plaintiff's own. He was not in the employ of the defendant, either generally or specifically. It is con-



ceded that Woodbridge inquired of the doctor as to the nature of plaintiff's injuries before making any statement to him (plaintiff) as to the probable nature, extent, and duration thereof, and it appears to the majority that he (Woodbridge) did no more than to repeat the substance of what the doctor said to him. The doctor himself, answering a question catagorically, said that he did not make the statement which Woodbridge repeated to plaintiff, but he qualified this statement in such a way that a jury must have found that he did in fact make substantially the same statement which Woodbridge repeated to plaintiff, save such verbal inaccuracies as naturally arise in trying to repeat a statement made by another. In the opinion of the majority there is no testimony whatever that would justify a finding that Woodbridge concealed anything from the plaintiff, or that he intentionally or fraudulently made any misstatements in his attempt to repeat what plaintiff's own doctor said to him regarding plaintiff's case. True, the doctor was mistaken, but he was plaintiff's own choice, and Woodbridge did no more than attempt to state what the doctor told him. He offered no opinion of his own, and did not profess to have any knowledge of the subject. In addition to this, there is testimony in the record, undenied by plaintiff, to the effect that he (plaintiff) did not rely upon this statement, but said himself that he believed that he would be laid up longer than the time fixed by the doctor. Moreover, according to plaintiff, the statement as to what Woodbridge said the doctor stated to him was made some three or four days prior to the time the settlement was had, and plaintiff did not, as he says, see fit to inquire as to whether or not his doctor had made any such statement. True, he says that he did not see the doctor in the *interim*, but the doctor says he did see plaintiff. However this may be, it is conceded that plaintiff's wife was in communication with the doctor and could easily have reached him at any



time by phone, and that nothing was done in this direction. The settlement was not hastily made. It was under consideration by plaintiff and his wife for many days, and some of the testimony indicates that relatives were also counseled. However this may be, one of the relatives, an experienced miner, was present when Woodbridge made his first proposition of settlement, and, if he did not advise the settlement, he certainly offered no objections thereto.

For all time the law has favored the settlement and adjustment of controversies, and when fairly made and uninfluenced by fraud or false representations, or overreaching, they should be upheld.

3. SAME:  
compromise  
and settle-  
ment.

Of course, where such settlements are made with injured and necessitous persons who have not had the aid of counsel, they should be closely scrutinized in order that one who is liable may not profit from his own fraud or wrong. But when fairly and intentionally made, especially where, as in this case, the claim is, to say the least, doubtful, they should be upheld. It is entirely competent for persons of sound mind to make such contracts as they will, and the law does not undertake to act as guardian for every one who is injured in the matter of making settlements with the party who is responsible therefor. It will see, however, that no undue advantage is taken of one who may be in a badly injured and necessitous condition, and do everything in its power to avert the consequences of fraud and misrepresentation.

Every one, no matter what his injuries, has a right to settle the damages resulting from the negligence of another, and it is not for the courts to either deprive him of the privilege or to relieve him of the consequences thereof simply because he was mistaken as to the nature and extent of his injuries. Our conclusions here find support in the following, among other, cases: *Rauen v. Insurance Co.*, 129 Iowa, 725; *Kilmartin*

4. SAME:

*v. Railroad Co.*, 137 Iowa, 64; *Nason v. Railroad Co.*, 140 Iowa, 533; s. c., 149 Iowa, 608; *Douda v. Railway Co.*, 141 Iowa, 82; *Blossi v. Railroad Co.*, 144 Iowa, 697; *Johnson v. Railroad Co.*, 107 Iowa, 1. In this connection it should be stated, however, that the case differs from some of these relied upon by appellant which hold that an erroneous opinion of an attending physician as to the nature, extent, and probable duration of an injury can not be made a ground for setting aside a settlement; in this that Woodbridge was not a doctor and was not undertaking to give his own opinion, but was attempting to repeat a statement said to have been made to him by plaintiff's own physician, and if he falsely and fraudulently misrepresented what the doctor said to him, and plaintiff believed his statements to be true and acted thereon, this would amount to such a fraud as would nullify the receipt and settlement. The difficulty in the case is to find any false or fraudulent statement made by Woodbridge, or any reliance upon whatever statements were made. Again, there is nothing, as the majority think, to show any material misstatement of what the doctor said. The difference of opinion between the majority and the minority is not so much as to the law but as to whether or not there was a question here for a jury. On one proposition—that is to say, there being a lack of testimony to show mental incapacity—we are all agreed, however.

It follows that, for the reasons pointed out, the judgment must be, and it is,—*Reversed*.

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STATE OF IOWA V. ELMER PRICE, Appellant.

**Criminal law:** SEDUCTION: EVIDENCE: INSTRUCTION. Where an accused, by false promise, protestations of love, deception or other artifice, persuades a chaste woman to yield her virtue, when but for some or all of these she would not have done so, he is

guilty of the crime of seduction; and an instruction to that effect was proper, even though there was evidence that a conditional promise of marriage was what finally induced her to yield.

**Same:** EVIDENCE. The question of whether the prosecutrix in this case yielded in consequence of defendant's false promise, protestations of love, deception or other artifice, is held under the evidence to have been for the jury.

**Same:** EVIDENCE. Where the question of sexual intercourse is reduced to a mere matter of barter and sale, as a promise of future marriage in exchange for present sexual favors, it will not amount to seduction; but where a young girl yielded her virtue to one professing love and affection, had previously made her a promise of marriage and insisted that under the circumstances there was nothing wrong in the indulgence, the fact that she required him to renew his promise that he would marry her if anything happened was not sufficient to preclude his conviction for seduction.

*Appeal from Van Buren District Court.*—HON. FRANCIS M. HUNTER, Judge.

WEDNESDAY, NOVEMBER 20, 1912.

THE defendant was convicted of having committed the crime of seduction. He appeals.—*Affirmed.*

*J. C. Mitchell and Walker & McBeth*, for appellant.

*George Cosson*, Attorney-General, and *John Fletcher*, Assistant Attorney-General, for the State.

LADD, J.—Prosecutrix testified that the accused had sexual intercourse with her in the evening of December 16, 1910. She was then sixteen years old, and he eighteen or nineteen. She testified that he walked home with her frequently, had accompanied her to dances, and had been in her company on other occasions; that some time previous to the date named he had told her that he loved her

and proposed marriage, which she had accepted; that he had hugged and kissed her whenever with her alone; that he so did and told her that he loved her on the way home on the night in question, and asked her to "let him do it," assured her that it was not wrong, as they were to marry anyway, and finally said that he would marry her "if anything happened"; and that she yielded to his embraces after requiring him to repeat this last statement. On cross-examination she stated that but for this last promise she would not have submitted, and that it was what finally led her to yield.

I. Appellant complains of several instructions, in that they permitted conviction if intercourse were procured by protestations of love, deception, or other seductive arts,

I. CRIMINAL LAW: for that prosecutrix testified that the con-  
seduction: ditional promise of marriage was what finally  
evidence: induced her to yield, and there was no evi-  
instruction. dence of other seductive arts. But she did not say that

this was the only influence operating on her will. For all that appears, she may not, and the jury might have found that she would not, have yielded had all protestations of love been omitted, or had he not insisted that, as they were engaged to marry, sexual indulgence would be no harm. This last, doubtless, was what the court alluded to as "other seductive arts," and of which, contrary to appellant's contention, there was evidence. The mere fact that the promise to marry her if anything happened was the final argument which persuaded prosecutrix to yield did not eliminate from consideration the other influences which may have operated to overcome her scruples. Indeed, it is scarcely conceivable that a chaste woman could be induced to step aside from the path of virtue in the absence of all blandishments of love; and, even though a false promise may be essential to overcome her inclinations to virtue's side, other influences, such as protestations of love and artifices, such as assurances that there

would be no harm because of an engagement, may have been quite as potential in accomplishing the seduction. If, then, by his protestations of love or other deception or other artifices, in connection with a conditional agreement to marry, or without this, the accused persuaded the prosecutrix to yield to his embraces, when but for such protestations or deception or other artifices she would not have done so, this was sufficient to sustain a finding of guilt, regardless of whether some of these or the conditional promise was what finally determined the issue. In other words, the previous chastity of an unmarried woman having been ascertained and the fact of intercourse established, the inquiry is as to the means by which this was accomplished; and if the accused, by false promise, protestations of love, deception, or other artifice, persuades such woman to yield, when but for some or all of these she would have known "no bliss but that which virtue gives," he is guilty of the crime of seduction. See *State v. Criswell*, 148 Iowa, 254; *State v. McIntire*, 89 Iowa, 139; *Breiner v. Nugent*, 136 Iowa, 322.

Our conclusion is that, notwithstanding the testimony of prosecutrix that the conditional promise of marriage was what finally induced her to yield to sexual indulgence, the court did not err in submitting to the jury whether seduction was accomplished by protestations of love, deception, or other artifices.

Whether the evidence was sufficient to warrant a finding on these separately necessarily depends somewhat on the age and experience of the parties, their relation to one another, and other circumstances. *State v. Hayes*, 105 Iowa, 82; *Hawn v. Banghart*, 76 Iowa, 683; *Marshall v. Taylor*, 98 Cal. 55 (32 Pac. 867, 35 Am. St. Rep. 144). Enough of the evidence has been recited to indicate that the issues were for the jury to pass on.

2. SAME:  
evidence.

II. Counsel for appellant also criticise the instruc-

tions in authorizing conviction upon a finding that intercourse was procured on the conditional promise of marriage in event pregnancy followed. Where  
3. SAME: evidence. the matter is one merely of barter, as in *People v. Smith*, 132 Mich. 58 (92 N. W. 776), there is reason for saying this does not amount to seduction. It is then but a blunt offer of wedlock *in futuro* in exchange for sexual favors *in presenti*. *State v. Reeves*, 97 Mo. 668 (10 S. W. 841, 10 Am. St. Rep. 349).

But it ought not to be said that a young girl of sixteen years, in yielding to one professing to love her, and in the circumstances described by prosecutrix, on the strength of such a promise, is necessarily of previous unchastity, or submitted as the result of passion, rather than the false promise of the accused. *State v. Hughes*, 106 Iowa, 125; *State v. Knutson*, 91 Iowa, 549; *State v. O'Hare*, 36 Wash. 516 (79 Pac. 39, 68 L. R. A. 107, 104 Am. St. Rep. 970). We adhere to the rule announced in the *Hughes* case.

The definition of previous chastity was correct, and the evidence such as to preclude interference with the verdict by this court.—*Affirmed*.

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WILLIAM EDWARDS, Appellee, v. ANNA M. HASEL,  
Appellant.

**Municipal corporations: STREET OBSTRUCTIONS: NEGLIGENCE: EVIDENCE.** A city may authorize the use of areas for admitting light from the street to the basements of abutting buildings, and this authority may be implied from long acquiescence in their use; but a property owner may be liable for negligence in the use of the same, notwithstanding the permission. The evidence in this case, that defendant maintained a two-inch plank covering over the window grating in the walk, on which plaintiff stumbled and was injured, was sufficient to take the question of his negligence in so doing to the jury.

**Same: NEGLIGENCE: EVIDENCE.** The property in this case was in the possession of a tenant at the time of plaintiff's injury, and the court instructed that defendant could not be held liable unless it was found that the obstruction was furnished by defendant for use by the lessee, for the purpose and in the manner it was used at the time of the accident. *Held*, that the evidence that defendant furnished the cover for the opening constituting the obstruction was sufficient to take the question of defendant's liability to the jury.

*Appeal from Scott District Court.*—HON. A. J. HOUSE, Judge.

WEDNESDAY, NOVEMBER 20, 1912.

ACTION for damages for a personal injury caused by an obstruction upon the sidewalk, placed thereon by the defendant. There was a verdict for plaintiff, and defendant appeals.—*Affirmed.*

*Thuenen & Shorey*, for appellant.

*Cook & Balluff*, for appellee.

EVANS, J.—We quote from appellant's brief the following statement of facts, which the evidence fairly tends to support:

The defendant is the owner of certain premises in the city of Davenport, Iowa. Said premises were leased by defendant to one Traeger in December, 1908, for a period of five years, and were occupied by a subtenant at the time the injury occurred. The building on said premises extends up to the sidewalk. A cellar window is cut into the sidewalk, and extends about eighteen inches out from the building, and is about two and one-half feet wide, running along the side of the building. The cellar window has an iron grating over it to prevent persons from stepping into the opening, and during the winter months, and for more than thirty-five years, has had a wooden covering. This wooden covering is two inches thick, and consequently stands two

inches higher than the surface of the sidewalk. Just east of the cellar window is a door leading into a storeroom, which storeroom was occupied by a subtenant, and was used as a saloon at the time of the accident. On or about March 9, 1909, the plaintiff coming out of the saloon, stepped onto the platform in front of the door, made a short turn to the west, and when he stepped off the platform in front of the door bumped his toe against the covering and fell, injuring himself severely. The covering was in good repair.

This suit is based upon the theory that the covering maintained, as above stated, was dangerous, and that it was negligence on the part of the defendant to maintain the same. This covering was placed over the cellar window only during the winter months, and was removed in the spring of each year, and not replaced until the following winter. This custom had continued for over thirty-five years. The evidence shows that previous to the leasing of said premises this defendant and her husband had occupied the same, and during the time of their occupancy they had each winter placed this covering over the cellar window.

I. It is the first contention of the appellant that there was a failure of proof of negligence of the defendant, and that a verdict should have been directed on that ground.

I. MUNICIPAL  
CORPORATIONS:  
street obstruc-  
tions: negli-  
gence: evi-  
dence.

Assuming, first, that the defendant was instrumental in placing the obstruction complained of, did it render the sidewalk not reasonably safe for the use of pedestrians?

Or, rather, can it be said as a matter of law that such sidewalk was reasonably safe for the use of pedestrians notwithstanding such obstruction? We have held that the city may authorize areas and cellarways leading into basements of abutting buildings. *Perry v. Castner*, 124 Iowa, 391. The evidence in this case would warrant a finding of authority by the city from long acquiescence to maintain the obstruction complained of. We have held also that a property owner may be held liable for negligence in the



use of such privilege notwithstanding the permission of the city. *Calder v. Smalley*, 66 Iowa, 219. In the case at bar it must be said that the evidence in support of the alleged negligence of the defendant is very slender. But it must also be said that it is sufficient to carry the question into the field of fact. We can not say as a matter of law that the maintenance of this obstruction in the manner shown was not negligence.

II. It appears that the property was in possession of a tenant. The trial court instructed the jury that the defendant could not be held liable for the obstruction complained of, unless they found "that such  
2. SAME:  
negligence:  
evidence. cover was furnished by the defendant for use by her lessee, for the purpose and in the manner in which it was used at the time." It is urged by appellant that there is no evidence in the record to sustain the hypothesis that the cover in question was furnished by the defendant to her lessee. It is true that there is no direct statement in the record to that effect, but such fact may be found as a fair inference from other facts in the case. The defendant testified that she had used such cover in like manner in the winter time for several years during her actual occupancy of the premises, and that she rented the premises in December, 1908, to one Traeger, who sublet to his brother-in-law, Joens. One witness testified that the cover was in place in the fall of 1908. Joens testified that it was there when he went into possession on January 1, 1909. We think this evidence furnished sufficient basis for the instruction of the court. No other complaint is made of the instructions.

It is our conclusion that the judgment below must be—*Affirmed*.

WILLIAM JOHNSON V. CORN PRODUCTS REFINING COMPANY, a Corporation, Appellant.

**Master and servant: NEGLIGENCE: PROXIMATE CAUSE: EVIDENCE.**

- 1 Where an injury may have been caused in several different ways and one is as probable as the other no recovery can be had. The facts supporting the theory relied upon must be of such a nature, and so related to each other, that no other logical conclusion can fairly and reasonably be drawn from them. In this action the evidence is held sufficient to take the question of whether plaintiff was injured by the falling of sand and dirt upon him from a pilaster near which he was excavating to the jury.

**Same: SAFE PLACE TO WORK: EVIDENCE.** The evidence in this case

- 2 is held to require submission of the question of defendant's negligence in failing to make the pit in which plaintiff was employed a safe place to work, by properly lighting it and guarding against falling sand and dirt.

**Same: ASSUMPTION OF RISK.** Where plaintiff knew nothing of the

- 3 danger and proceeded with his work of excavating as directed, which did not apparently undermine the pilaster that crumbled and injured him, he was justified in assuming that the excavation could be done in safety.

**Same: SUBMISSION OF ISSUES: PREJUDICE.** No prejudice to the de-

- 4 fendant resulted in this case by copying the pleadings, alleging several grounds of negligence, into the instructions; as the court thereafter clearly defined the issues and limited consideration by the jury to certain specific grounds of negligence actually submitted.

**Same: INSTRUCTIONS: NEGLIGENCE OF AGENT.** An instruction that

- 5 the negligence of defendant's corporate officers or agents was that of the corporation, and that its foreman was an officer, and any negligence of his was imputable to it, was inaccurate in describing the foreman as an officer, and in making any negligence on his part imputable to the corporation, in the absence of a showing that he was a vice-principal; still it was not prejudicial where the duties resting upon the foreman were those of the master relating to the safety of an employee.

*Appeal from Scott District Court.*—HON. L. J. HORAN,  
Judge.

WEDNESDAY, NOVEMBER 20, 1912.

ACTION for damages resulted in judgment against defendant, from which it appeals.—*Affirmed.*

*Lane & Waterman*, for appellant.

*Walter H. Peterson* and *Bolinger & Block*, for appellee.

LADD, J.—I. The defendant is a manufacturer of edible products from corn, and plaintiff was in its employment as a common laborer. Prior thereto he had worked in car construction and repair shops, and at excavating for and laying sewers and tile. He had been working for defendant in the "roustabout gang," of which one Lane was foreman, for some time, when required by the foreman to go to the blacksmith shop. This shop was about eighteen feet square with a wooden floor about three feet above a granitoid floor six inches thick. The defendant, for some purpose in relation to the foundation, had caused a pit to be excavated beneath this shop about eleven feet deep, measuring from the wood floor, and therein a pillar of dirt or sand covered with granitoid had been left as a sort of platform onto which the dirt from the bottom could be thrown, and then taken by a man on top of the pillar, and thrown through a hole in the wood floor about two feet square. The excavation is more particularly described by plaintiff, and, as the right to recover at all is challenged, his testimony with respect thereto and of how the injury was received may be set out somewhat fully.

The excavation had been there before that day about

a week. I did not have anything to do with the excavating or the digging of this trench or hole. There was a space cut off of the outside wall in the neighborhood of three and one-half feet wide, running back eight feet, and then north eight feet to the main wall of the steephouse. Then take it over in this side, we will say four feet, and there was another cut-off made. It ran to the bottom and then this strip here in the main wall of the steephouse was to be dug out so as to allow the masons to work on the floor of this cement foundation, and this space in here, along next the main foundation, was to be opened in order to give the masons a chance to lower the main foundation to the bottom of this pillar. And they left a pillar in the neighborhood of three and one-half or four feet square at the top that went to the bottom, standing there unprotected. It was about the same size at the bottom as at the top. A little bit wider at the bottom, probably a few inches. On the top of this pillar it was granitoid about six inches through. That granitoid covered pretty nearly the entire top. There was a three-cornered point right across the corner from the square that was unprotected with granitoid. The granitoid had been taken off it. The pillar was left for the purpose of throwing the material out of this excavation on top to enable the men to get through the floor to get it outside where it could be disposed of. On the day I was hurt before I went into this excavation I had been cleaning up inside of the building. I had nothing to do with excavating or digging in the hole before that day. I had never been in that hole. I had never seen it before. . . . Mr. Lane came to me in the afternoon around about four o'clock, and he was pretty well cleaned up on the inside, and he asked me to go with him to the blacksmith shop, and we went there, and he put me down on top of this granitoid to help the other fellow to throw up the dirt, because being so low that a man couldn't shovel only a few shovels until he would have to crawl out of it. I got into the hole by going over to this corner where the trapdoor is, and getting down on this granitoid and crawl through underneath. I crawled as far as the hole in the wooden floor. At this time there was a man down in the hole when I crawled in. He was shoveling dirt up onto this pier. At that time I was staying back to one side of the place, and there was another

man shoveling. I was waiting until he got tired and came up, so as to make a change. I threw dirt through this little hole. They had one extension light with two lights on is all they had. That was hanging over the rafters, over to one side of the excavation. The lights were not directly over the hole. They were just to one side. To a certain extent they were thrown in, but not sufficient force in them to give a person a clear sight. It was just light enough so you could see to work, and that was all. There were two lights on one extension. I should judge the lights were probably sixteen candle power. They had glossed over with dirt. You could hardly see through them. . . . When I went to the hole, I did not know what the pillar and walls were made of. I was on-top of the pillar about half an hour. I went down in the hole because I was required by the foreman Mr. Lane. . . . The other man that was down there came up. I took his place. I did not take my shovel. There were shovels already in the pit. When I got down there, it was betwixt and between dark and light in the hole. It was light enough to work, but not to see what kind of material. I could not see what kind this material was when I got down. I was hurt as near as I can judge about fifteen or twenty minutes after I got down. After I got down, I went ahead as I was directed. There was a little piece of dirt laying in the main wall of the steephouse that was to be removed. It was in the neighborhood—we will say it was sixteen inches wide, a strip remaining of the pier that goes to the bottom, to give the room for the masons to work under this main wall. It was an addition to the pillar. It was not a part of the pillar. It was fastened on to the pillar on one side. It was cleared out so as to give the masons a chance to work on the main foundation, the main wall. We had already removed that. I started to remove that little piece that was along this main wall. It was attached on up against the main wall of the steephouse. It was an addition to the pillar, but then it was at the bottom. I did not at any time dig any dirt in under this pillar. I did not take any dirt off the pillar at all. I was working from the foundation or underneath the main foundation for to give room for the mason to extend that foundation. I did not remove any dirt from the pillar. As to what happened when I started

to remove this dirt, well, I was bent over shoveling straightening up the back part underneath this pier or main foundation when the fall got me. Q. What was it that fell on you? A. I don't know. I was standing with my right side to the pillar. As near as I can get it, I was facing east. There was a foundation down there, part of the way down of the steephouse. I was working near that foundation. I suppose the foundation was made of brick and mortar, but I don't know. It might have been made of concrete, but the piers that were put in there were made of brick. I couldn't see what any of this was made of when I went down there. Q. Now, what effect did this caving in or falling have on you, Mr. Johnson? What happened to you then? A. I don't know. I didn't know anything until after I was taken to the office.

Upon being recalled, after defendant had moved for a directed verdict, plaintiff testified further:

I was bending over, shoveling. I was probably eight or ten inches from the pillar. Q. And then what happened? A. And then there was—I noticed there was a squeeze that turned me half around. Q. What do you mean by 'squeeze'? A. A caving. A caving of sand or dirt or some kind of soft material. Q. What happened then? A. Then I didn't know anything more until I came into the office. Q. Did you notice anything falling on you? A. No; just nothing only what fell at that slide. Q. Just describe what fell on you. What did it feel like, would you say? A. It was either dirt or sand or some soft material. At that time I couldn't tell. Q. How do you know that? A. Because it caught me around above the waist here, and buried me that deep [indicating]. I remember that. This fall came from the right side. It came from the south. It came from the pier, and then I lost consciousness. Q. Did I understand you to say you felt yourself being buried? What do you mean? I don't understand. A. Yes. I felt myself being buried by some soft material that closed in around. It struck me first on the shoulder here. Q. State whether or not you lost consciousness immediately. A. I didn't know at the time that they took me out at all. Q. But you felt yourself being buried by something? A. Yes, sir.

On cross-examination:

When you were asked this morning the plain simple question what was it that struck you and hurt you, and said 'I don't know'— A. Well, I don't know yet. Q. What have you been saying then—that sand and dirt came down and buried you? A. I just said that it seemed to me that was. Q. You don't mean now that you know anything about what it was, do you? A. I am not positive, no; but then I say it seemed to me as it came around me and buried me up. Q. You said this morning you lost consciousness as soon as something struck you on the shoulder. A. As soon as it buried me. . . . Q. Now you are not able to say now that that man might not have dropped something on your shoulder that broke the bone, and caused you to become unconscious, are you? A. I know he didn't. Q. How do you know, if you lost consciousness and don't know what hit you, how do you know he didn't drop something on you if you lost consciousness? A. Well, one reason is that I kept the stuff pretty well throwed up to him on the upper floor. Q. How do you know he didn't pick up a piece of this concrete, and try to throw that out, and it dropped on you? A. Because there was no concrete loosened up. Q. How do you know there wasn't any loosened up at that time? You never went back afterwards, did you, to look at the top of that pillar? A. No; and then I spoke to Mr. Lane just before the thing fell asking for the privilege of taking that there granitoid off and throwing it out of there, and working from the top. Q. You don't know what that man on top of the pillar might have had in his hands, and suddenly let fall on you, do you? A. No, sir.

II. It will be noted that plaintiff relied wholly on circumstantial evidence to show how the accident occurred. Appellant insists that he did not succeed. The testimony was that there was a caving in of sand, dirt or some kind of soft material from the direction of the pilaster beside which he was working; that it seemed to come from the pilaster; that it filled in about him above the waist; that it first struck him on the shoulder; and that he felt himself being

buried by some soft material when he lost consciousness. He admitted on cross-examination that he was not positive that this occurred, but said that it seemed so to him. Apparently all happened in so short a time that he had no opportunity to observe before he was rendered unconscious by the falling sand or something striking his shoulder. From this evidence the only reasonable inference was that the sand or dirt had slid or fallen away from the pilaster about him. The jury might have concluded it came from that direction, and it could not well have come from the side of the pit beyond the pilaster. This was about three or four feet square and eight feet high, with the granitoid on top, and must have dried out some in the several days it had been in this condition, and the inference that the sand or dirt which slid about plaintiff came therefrom is exceedingly probable, and, in the absence of any other explanation, might well have been adopted by the jury. If the falling dirt or sand carried the granitoid with it, or a tool used from the laborer above and one of these struck plaintiff, such falling was quite as much the proximate result as though a stone or other substance in the dirt or sand had been carried against his shoulder, and caused the fracture. Of course, the injury may have been occasioned by the laborer above dropping a tool or a piece of granitoid, as suggested by appellant, or in other conceivable ways, but there is nothing in the evidence pointing to any such cause, and, as the falling of the sand and dirt from the pilaster reasonably might have produced the injury and no other explanation is afforded by the record, the jury might have concluded that this was the operating agency in bringing about the result.

As contended, if the injury might have been caused in several different ways and the probabilities as to two or more are balanced, then there can be no recovery. *Neal v. Railway*, 129 Iowa, 5. This is only another way of expressing the rule laid down in *Asbach v. Railway*, 74 Iowa,



248, in saying that the theory on which recovery must be had can not be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they may be consistent merely with that theory, for that may be true, and yet they may have no tendency to prove the theory. This is tantamount to saying the evidence must be such as in the nature of the case will convince an ordinarily reasonable person that the injury complained of was the proximate result of the particular cause alleged. If another inconsistent with the cause alleged is equally probable, the former can not be said to have been proven. But, as said in *Brownfield v. Railway*, 107 Iowa, 254: "Where a cause is shown which might produce an accident in a certain way, and an accident happens in that manner, it is a warrantable presumption, in the absence of showing of other cause, that the one known was the operative agency in bringing about the result." *Degelau v. Wight*, 114 Iowa, 52; *Tibbits v. Railway*, 138 Iowa, 179; *Brown v. Coal Co.*, 143 Iowa, 663; *Bell v. Bettendorf Axle Co.*, 146 Iowa, 337; *Paulson v. Bettendorf Axle Co.*, 146 Iowa, 399.

The evidence was sufficient under this rule to carry to the jury the issue as to whether the injury was caused by the sand and dirt falling or sliding from the pilaster.

III. Counsel for appellant argue that there was no evidence tending to sustain findings that the pit was an unsafe place to work, or that the defendant was negligent in not warning the plaintiff of the dangers incident to the work. The evidence tended to show that the pit was so dimly lighted that plaintiff, when he entered, could not see the nature of the soil, but was able to see the ridge next to the pilaster, but apparently forming no part of it. He was directed to re-

1. MASTER AND  
SERVANT: neg-  
ligence: proxi-  
mate cause:  
evidence.

2. SAME: safe  
place to work:  
evidence.

move the ridge, and there is nothing in the record indicating that he attempted anything else. The falling or sliding of the earth composing the pilaster was not a thing to be anticipated, as where laborers are shoveling banks of clay or gravel, and it falls or slides down as the work proceeds. See *Fredericks v. Brick & Tile Co.*, 151 Iowa, 637; *Naylor v. Railway*, 53 Wis. 661 (11 N. W. 24); *Swanson v. Railway*, 68 Minn. 184 (70 N. W. 978). This pillar did not constitute a transitory danger incident to the work, at least nothing in the record indicates but that it was intended to remain permanently.

Plaintiff knew nothing of danger to be anticipated therefrom, but proceeded to do the very thing required, which, as it did not apparently undermine said pilaster, he had the right to assume might be done in safety. *Herr v. Green*, 156 Iowa, 532. True, 3. SAME: assumption of risk. had excavated tile and sewer drains, but in what manner that would have aided him in ascertaining in this dimly lighted pit that this pilaster was not likely to stand we are not informed. Conditions were such that the court did not err in leaving the jury to say whether defendant was negligent in failing to furnish a safe place to work and in omitting to put a guard against its dangerous condition if so found.

IV. Another contention is that the instructions are confusing as to the issues with respect to the negligence alleged. The pleadings were copied therein, and therefrom it appears that there were five grounds of negligence: (1) the pilaster was dangerous, 4. SAME: submission of issues: prejudice. in that no support therefor was provided; (2) in failing to make use of another device for the purpose for which the pilaster was left; (3) in failing to warn of the dangers in doing what was required of him; (4) in failing to light the pit; and (5) in not providing a safe place in which to work. In the third instruction the jury was told that, in order to recover, it must appear that "the

falling upon him of the pillar in question was the result of some negligence upon the part of defendant," and in the fifth instruction that, to warrant a recovery, it must be found (1) "that before or at the time of his injuries the defendant was negligent substantially as claimed, as above set out and that its negligence was the cause of his injuries; (2) that he was himself free from any negligence which contributed to his injuries; (3) the amount which he was damaged by reason of such injuries. And you should, in your deliberations, take up each one of these propositions in the order stated, and discuss and decide them one at a time." In the sixth instruction the alleged negligence of defendant is taken up, and, after some discussion, the jury are told the questions of defendant's negligence for their consideration are narrowed down to these:

(1st) Was the place in which the plaintiff was working at the time he received the injuries complained of an unsafe place to work?

(2) If you find that it was a safe place to work, then you need go no further, and your verdict should be for the defendant. If, on the other hand, you find it to be an unsafe place to work, then you should determine whether or not the defendant, in the exercise of reasonable care, should have known that it was an unsafe place to work.

(3d) Should defendant have warned plaintiff of such dangers?

This statement of the record excludes all doubt as to the grounds of negligence actually submitted. The jury are plainly told in the sixth instruction that these were narrowed down to two, and then this is emphasized by instructing that, in event the pit was a safe place to work, to find for defendant, and, if not, to determine whether plaintiff should have been given warning. There was no prejudice in copying the pleadings as subsequently grounds of negligence stated therein not sustained by the evidence were eliminated and the issues to be determined clearly expressed.

V. In the seventh instruction the court told the jury that the negligence of the officers or agents of a corporation is that of the corporation, and, as Lane was an officer of defendant, any negligence on his part was imputable to it. The instruction is not accurate in describing Lane as an officer, for he was not, nor in saying broadly that "any" negligence on his part was that of defendant, for whether he was vice principal was not conclusively established. But all this was without prejudice, for Lane in what he did in the matter of providing a safe place in which to work or in the matter of giving necessary warning of conditions rendering the place unsafe was performing a masterial duty, and any negligence of the foreman therein was that of defendant. *McGuire v. Waterloo & C. F. Union Mill Co.*, 137 Iowa, 447; *Hamm v. Bettendorf Axle Co.*, 147 Iowa, 681; *Hardy v. Railway*, 149 Iowa, 41. The amount allowed as damages was not so large as to justify interference therewith.—*Affirmed.*

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FRED WESEMAN, Appellant, v. ED. GRAHAM.

**Contracts:** CANCELLATION: EQUITABLE JURISDICTION. The cancellation of an instrument can only be obtained in an equitable action: So that where plaintiff pleaded a contract, its breach, and demanded liquidated damages, and defendant admitted its execution but denied its effectiveness because of certain conditions, and in a cross-petition pleaded fraud and asked a cancellation of the contract, the court properly transferred the cause to the equity side of the docket.

**Same:** RESCISSION: FRAUD: ESTOPPEL. A party is not estopped from pleading fraud in the procurement of a contract until the fraud is discovered. Thus where a refusal to perform a contract for the exchange of lands was based on the ground that the contract was not completed, and defendant pleaded that all he knew of the land the adverse party was to convey was what he stated, and upon subsequent investigation found the statements false, he was

not estopped from pleading the fraud, when sued for liquidated damages for refusal to perform, as ground for rescission.

*Appeal from Johnson District Court.*—HON. R. P. HOWELL, Judge.

WEDNESDAY, NOVEMBER 20, 1912.

SUIT to recover liquidated damages. Judgment for the defendant from which the plaintiff appeals.—*Affirmed.*

*Remley & Remley*, and *Milton Remley*, for appellant.

*Ball & Ball* and *Wade, Dutcher & Davis*, for appellee.

SHERWIN, J.—The parties to this action signed a writing by the terms of which they were to exchange real estate; the plaintiff's land being in Nebraska and consisting of 605 acres, and the defendant's land being in Missouri and consisting of 1,109 acres. The writing provided for liquidated damages in the sum of \$5,000 should either party fail to comply with its terms.

The plaintiff pleaded the agreement, alleged a breach thereof, and asked to recover the damage provided for therein. The defendant admitted signing the writing, but

1. CONTRACTS:  
cancellation:  
equitable  
jurisdiction. denied that it ever became a contract between them. He alleged that it was delivered to a third party, to be held until he could learn whether his brother, who was the owner of the Missouri land, had a deal on for the sale or exchange of the land, and, if he had, that the writing was not to be delivered to the plaintiff, and was not to become effective or a contract binding either party. The defendant further pleaded that at the time in question his brother was negotiating the sale or exchange of the Missouri land, and that, upon learning thereof, he immediately notified the plaintiff

of such fact, and of the fact that he could not make the contemplated contract with the plaintiff. The defendant in a cross-petition pleaded false and fraudulent representations as to the quality and value of the Nebraska land, and asked that the contract be canceled. After the issues had been thus settled, the defendant moved to transfer the issue on the cancellation of the contract to the equity side of the docket to be first tried. This motion was sustained, and the issue was so tried; the trial resulting in a judgment for the defendant. We are of the opinion that the court properly sustained the motion to transfer. It is, of course, true that the question whether there had, in fact, been a contract and the question of fraud in its procurement, if there was a contract, could both be determined in a law action. But the plaintiff might have dismissed before trial, in which event the defendant, in the absence of a cross-petition praying a cancellation of the contract, might still be subject to another action on an apparently valid contract. We have held that the cancellation of a contract can only be procured in equity, and under the rule so announced the issue here was properly tried. *Twogood v. Allee*, 125 Iowa, 59; *Carey v. Gunnison et al.*, 65 Iowa, 702; *Johnston & Son v. Roebuck*, 104 Iowa, 523. .

The defendant claims that the writing was not to be delivered or to become effective as a contract, if his brother, who was the owner of the Missouri land, was at that time negotiating a sale or exchange thereof. On the other hand, the plaintiff claims that the only condition on which the completion of the contract depended was that the brother had already made a sale of the Missouri land. We reach the conclusion that the defendant's statement of this oral agreement is the true one, and that the writing never, in fact, represented a contract between the parties, for it is conclusively shown that the brother was then negotiating a sale or exchange of this land and was then in Missouri, or on his way there

2. SAME:  
rescission:  
fraud:  
estoppel.

in furtherance of such negotiation. But, even if the writing became a contract, we are convinced that it was procured by the false and fraudulent representations of the plaintiff as to the quality and value of the Nebraska land. The plaintiff knew the quality of his land and its value, while the defendant had not seen it, nor did he know anything about it aside from what the plaintiff told him.

The appellant says, however, that the defendant did not base his refusal to carry out the terms of the writing on the ground of fraud, and that he could not change his position after the suit was brought. The defendant based his refusal on the proposition that he had never made a contract, and at that time all he knew about the land was what the plaintiff had told him. But, after this suit was begun, he investigated the land, and found that plaintiff's statements relative thereto were false. If he did not know of the fraud that had been attempted when he first refused to complete the contract, he was not estopped from pleading and relying thereon after he knew the facts. The judgment is—*Affirmed*.

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OSCAR EK, Appellant, v. PHILLIPS FUEL COMPANY,  
Appellee.

**Master and servant: NEGLIGENCE: SAFE PLACE TO WORK.** In this  
1 action for injury to the driver of a coal mining car the evidence is held to take the question of defendant's negligence in failing to furnish plaintiff a safe place to work, because of a protrusion from a rib of the entry, to the jury.

**Same: CONTRIBUTORY NEGLIGENCE: ASSUMPTION OF RISK: EVIDENCE.**  
2 The fact that plaintiff had not seen the protrusion on the rib of the entry, that his position when driving the car and previously passing through the entry in going to and from his work was not favorable to a discovery of it, rendered the questions of his negligence and assumption of the risk for the jury.

**Appeal:** **ABSTRACT: PRESUMPTION AS TO EVIDENCE.** It will be presumed on appeal that the appellant's abstract contains all the evidence necessary to a consideration of the errors presented, unless the appellee shall supply alleged omissions by an amended abstract.

*Appeal from Wapello District Court.*—HON. F. M. HUNTER, Judge.

WEDNESDAY, NOVEMBER 20, 1912.

ACTION for damages against an employer for personal injury sustained by his employee in a coal mine. The defense was a general denial and a plea of contributory negligence and assumption of risk. At the close of plaintiff's evidence, the trial court directed a verdict for the defendant. Plaintiff appeals.—*Reversed.*

*E. R. Mitchell and J. C. Mitchell*, for appellant.

*McNett & McNett*, for appellee.

EVANS, J.—The plaintiff was a coal miner, and was in the employ of the defendant. He began work for the defendant on December 1, 1909, and worked at "driving entries" until and including January 28, 1910. On the morning of January 29th he was ordered to drive a mule team for that day. At 3:40 p. m. of that day he received the injury complained of, which resulted in the partial loss of his thumb. His thumb was crushed by a protruding rock which extended from the rib of the entry to a point which was perpendicular above the track rail. The point to which such protrusion extended was three feet and four inches above the rail, and gave a clearance above the edge of the car of only two inches. The immediate circumstances of the accident are described by the plaintiff in his testimony as follows:



At the time of the accident, I had my right foot on the bumper of the car and my left foot on the tail chain, and my left hand on the mule's rump, and my right hand on the car inside a little ways from the corner of the car on a chunk of coal. The tail chain run from the single-tree and hooked onto the bumper or drawbar. The drawbar passes through the car. As much as I have been around mines and seen drivers, I would say this is the usual position for drivers. This position is taken so that in going over a little hill, or if you have to stop the car, you can do so without the car running upon the mule. The mule doesn't work in shafts and has no way to hold a car that is going down a hill or incline. . . . As I was going down with my load to the bottom in that position, my thumb was crushed down to the joint by a rock protruding out. This is the same rock I testified to as to its height and distance above and below.

Plaintiff's evidence tends to show that the entries in this mine were required to be from seven to eight feet wide, and to have perpendicular walls or ribs and to be four and one-half feet high. This particular entry had the appropriate width at its bottom, and had also the appropriate height, but its walls sloped toward each other, so that the top width was only two feet and four inches.

I. The first question presented for our consideration is: Was there evidence of negligence on the part of the defendant in failing to furnish to plaintiff a safe place to

work as a driver? This question must be answered in the affirmative. Under the evidence, the question of defendant's negligence was fairly one of fact under all the circumstances.

Such a protrusion is naturally suggestive of increased danger to a driver and especially while upon a loaded car. The case is similar at this point to *Duffey v. Consolidated Co.*, 147 Iowa, 225.

II. Did it appear from all the evidence that there was contributory negligence or assumption of risk on the part of the plaintiff as a matter of law? The facts in



ribs, notwithstanding his denial of knowledge of this particular condition. But, even so, it was a question for the jury, and not for the court at this point.

Turning, therefore, to the other phase of the evidence, wherein it appears that he had passed this point with a load more than thirty times on the day of the accident, was he thereby bound as a matter of law to have discovered this protrusion? The position occupied by the plaintiff—with one foot upon the tail chain and one upon the drawbar, and with one hand upon the mule and one upon the car—was the usual one for drivers to occupy. He necessarily occupied a low stooping position with his face forward and down. This ordinary position was not favorable to the discovery of this particular danger. It is not claimed by appellee that the plaintiff was bound to make inspection of the entry in the ordinary sense. Its contention is that the condition was so obvious that the plaintiff was bound to see it. Special reliance is based upon the case of *Flockhart v. Coal Co.*, 126 Iowa, 576. In that case the accident occurred upon a new track. The specification of negligence was that there was no ballast thereon. The plaintiff therein was an experienced driver. It was held in that case that the unballasted condition of the track was so obvious that the plaintiff was bound to know it. The cases are not parallel. The obviousness of the defect stands out much more clearly in the cited case than in the case before us. In order to hold, therefore, in the case at bar that the plaintiff was bound to discover the protrusion complained of, we would have to go a step farther than we did in the *Flockhart* case. We think we would not be justified in so holding. We must hold, therefore, that the questions of contributory negligence and assumption of risk were for the jury.

III. A question of appellate practice is presented in appellee's brief. The first complaint is that appellant's brief fails to comply with the requirements of section 53 of the court rules. Since this objection was made appellant

has filed an amended brief which fully meets the question thus raised, and we need give no further attention to this feature of the case. The further objection is made that appellant's abstract does not purport to give *all* the evidence; the certificate thereto being as follows: "The above and foregoing is all the evidence offered or introduced on the trial of the cause *material* to or in any manner bearing on any matter, question or issue involved in this appeal." This objection is based upon a long line of decisions under the rules formerly in force from *Hubbard v. Epperson*, 40 Iowa, 408, to *State v. Stone*, 88 Iowa, 724. Counsel for appellee have evidently overlooked the change of rules which went into effect some years ago. Under our present rules, we indulge the presumption that appellant's abstract does contain all the evidence necessary for the consideration of the errors presented, unless the appellee shall supply alleged omissions by amended abstract. Code, section 4118, and rules 30, 31, 32. Appellee's exception to the state of the record must therefore be overruled.

For the reasons already indicated, the judgment of the trial court must be—*Reversed*.

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MARTHA BOSLEY, Plaintiff and Appellant, v. L. F. LAMMERS and L. L. ZENOR, Defendants, and I. K. WILSON, Intervener, Appellee.

**Contracts: NONPERFORMANCE: RIGHTS OF THIRD PARTIES.** Where a party agreed to pay a certain sum on the exchange of properties, and also a certain note on which the wife of the other party was a surety, and in addition gave another note indorsed in blank as collateral, the rights of the wife in paying the note on which she was surety and in obtaining the collateral were governed by the contract, and she could only recover to the extent of his nonperformance.

*Appeal from Polk District Court.*—HON. W. H. MOHENRY,  
Judge.

WEDNESDAY, NOVEMBER 20, 1912.

ACTION upon a promissory note. There was an intervention by one Wilson, the payee of the note, and alleged assignor to the plaintiff. On May 29, 1911, judgment was rendered for the plaintiff upon the pleadings for the full amount of the note, \$1,158. Two days later and at the same term a motion was filed by the intervener to set aside the judgment. On June 3 this motion was sustained in part, and the judgment as entered was modified. The plaintiff appeals.—*Affirmed.*

*A. M. Miller*, for appellant.

No appearance for appellee.

EVANS, J.—The plaintiff is the wife of B. J. Bosley. In March, 1910, B. J. Bosley and the intervener Wilson entered into a contract of exchange of property. This contract called for a conveyance from Wilson to Bosley of certain Texas land, and from Bosley to Wilson of certain stock in the Valley Union Coal Company. It also provided that Wilson should pay to Bosley a sum upwards of \$1,200, and that he should pay also a certain note of \$800 held by the First National Bank of Valley Junction. Later Wilson put up "as security for the fulfillment of this agreement" a note for \$1,049.56, and this is the note in suit. It does not appear into whose hands the note was put, but a writing was signed by B. J. Bosley and I. K. Wilson stating that such note was put "in escrow." Later a further agreement or modification was entered into and signed by the same parties. Certain papers, including the note in suit, were put into the hands of A. M. Miller. The

note was indorsed in blank by Wilson. The agreement entered into at that time contained the following provision: "And on the failure to pay said note to said Valley Bank the said A. M. Miller may collect the amount of said note and pay to the said Bosley or to Martha Bosley the amount thereof, less the costs of collection."

Martha Bosley was not a party to the agreement nor to any modification thereof. Neither did any of the writings disclose any interest on her part therein, nor did her name appear therein except as above quoted. Upon the trial, however, it was made to appear that she was a surety upon the \$800 note held by the First National Bank of Valley Junction. The undertaking of Wilson, therefore, to pay the \$800 note operated beneficially to her. Wilson failed to pay the note. Martha Bosley, as surety, was compelled to pay it. Thereupon she brought this suit against the makers to recover the full amount of the collateral note on the theory that she was an assignee thereof; the same having been indorsed in blank by Wilson. Wilson intervened in such action and pleaded that he was the owner of the note, and that the plaintiff had no interest therein unless it be as security for the \$800 note. He further pleaded that another action was pending between himself and B. J. Bosley, the plaintiff's husband, wherein he prayed for a rescission of the contract. This petition of intervention was filed March 20, 1911. This was the state of the pleadings when the trial court entered judgment thereon without trial on May 29th. The merits of the case were not developed until the hearing on the motion of the intervener to set the judgment aside. In plaintiff's motion for judgment, she had incorporated an allegation that rescission of the contract had been refused to the intervener, Wilson, by another branch of the court. Upon the hearing of the motion to set aside, it was made to appear that the plaintiff's husband, B. J. Bosley, had brought an action in his own behalf on the contract against Wilson, wherein he

claimed to recover of Wilson, among other items, the sum of \$800, for his failure to pay the First National Bank note. This suit was tried in another branch of the court and went to judgment in the latter part of April, 1911. Bosley prevailed in that suit and was allowed full recovery as to the \$800 and other items. Offsets, however, were allowed as against Bosley arising out of the same contract, and a balance was found in his favor of only \$425. Upon the final hearing in the present case, the trial court took notice of these facts and modified the judgment accordingly by reducing the interest of the plaintiff therein to the sum of \$425 and interest.

It is now argued for appellant that she was not a party to the other case and was not bound by any judgment entered therein. Granting that this appellant was not bound by the judgment as such, she was nevertheless affected by the facts herein stated. Her right to sue on the note, if any, arose wholly out of the contract between Wilson and her husband. The contract was indivisible. Her rights were not separate or independent from those of her husband under the contract. Her rights under the contract were only incidental to those of her husband and inseparable therefrom. A performance of the contract to Bosley was all that was required from Wilson. If Wilson had performed in full to Bosley, it would terminate his liability. Lacking only \$425 of performance, that was the full measure of his remaining liability under the contract. Wilson's liability could not be increased by controversy or dispute, if any, between the plaintiff and her husband. He was not bound to do business with both of them. Indeed, it does not appear that there was any controversy between them. The effect of the final order of the trial court was to limit the full liability of Wilson to the sum of \$425, for which judgment had already been obtained against him by the husband.

The order was clearly right, and it is—*Affirmed.*

AMERICAN FIDELITY COMPANY, Appellant, v. JOHN L.  
BLEAKLEY, Auditor of State.

**Insurance:** INDEMNITY AGAINST AUTOMOBILE ACCIDENTS: LEGALITY.

1 Neither subdivision 5-cl. 1, nor subdivision 5-cl. 2, of section 1709 of the Code Supplement of 1907, authorize the issuance of a policy indemnifying the owner or driver of an automobile, who is not an employer, against liability for damages resulting from an accident caused by the negligence of such owner or driver in operating the machine; as the first subdivision limits indemnity to personal injuries suffered by the insured himself, and not against liability for some negligent or wrongful act of his; and the second authorizes indemnity to an employer only, as against liability arising out of some act of his employee, and prohibits liability insurance not therein authorized.

**Same:** FOREIGN INSURANCE COMPANIES: INTERSTATE COMITY. The leg-  
2 islature has power to prescribe the terms and conditions upon which foreign insurance companies may do business in this state, and the courts will not override the will of the legislature on the ground of interstate comity.

*Appeal from Polk District Court.*—HON. LAWRENCE DE  
GRAFF, Judge.

WEDNESDAY, NOVEMBER 20, 1912.

THE facts are stated in the opinion.—*Affirmed.*

*James C. Hume*, for appellant.

*George Cosson*, Attorney-General, and *Henry E. Sampson*, special counsel, for appellee.

SHERWIN, J.—The American Fidelity Company is a foreign corporation, organized under the laws of the state of Vermont, and holds a license to transact business in this



state in accordance with the laws thereof. It has the power under its charter, by-laws, and the laws of Vermont to insure persons against loss and damage from all kinds of accidents, including the power and authority to insure drivers of automobiles against liability for damages to the persons and property of other persons resulting from accidents caused by the driver's negligence in operating his machine. In September, 1911, the said company entered into a contract of insurance with one W. F. Gabrio, a citizen and resident of Des Moines, insuring and agreeing to indemnify him as the owner and driver of a certain automobile "against loss from liability imposed by law for damages and expenses incurred on account of bodily injuries, including death resulting therefrom, accidentally suffered by any person or persons by reason of the maintenance, use, loading and unloading of" said automobile, and against loss "from the liability imposed by law on the insured for damages to property, and resulting from any accident caused directly by" said automobile. A few days later this policy of insurance was submitted to the defendant as auditor of the state for his examination and approval. Defendant refused to approve the policy, and ordered its cancellation under threat of expulsion of the plaintiff from the state. Thereafter this action was brought in equity, asking that the policy be declared legal under the laws of the state, and that the defendant and those acting under his authority be enjoined from interfering in any way with plaintiff's right to write such insurance, and from revoking plaintiff's license to do business in the state because of the issuance of said policy. A writ of mandamus was also asked, compelling the defendant to approve said policy. A demurrer to the petition was sustained, and, the plaintiff electing to stand on its petition, the action was dismissed, and plaintiff appeals.

The sole question for our determination is thus stated by appellant's counsel: "May a foreign insurance com-

pany, which has complied with all of the provisions of the statutes of Iowa relative to its admission to this state, and has received a license from the state auditor to do business within the state, having power by the laws of its own state and by its charter to insure the owner or driver of an automobile, who is not an employer, against liability for damages to persons resulting from an accident caused by the owner's or driver's negligence in operating his machine, issue such insurance in Iowa?" In support of appellant's contention that an affirmative answer should be made to this question, reliance is placed on the following propositions: First, that such insurance is authorized by the first clause of subdivision 5 of section 1709 of the Code; second, that such insurance is authorized by the second or "employer's liability" clause of subdivision 5 of the same section; and, third, that such insurance may be issued in this state under the doctrine of interstate comity, appellant having the power under its charter to issue such insurance and being licensed to do business in this state. These propositions will be considered in the order of their statement. The first clause of subdivision 5 of section 1709, as it appears in the Supplement of 1907, provides that any company authorized to do business in this state "may insure the health of persons and against personal injuries, disablement or death resulting from traveling or general accidents by land or water," and the second clause of subdivision 5 of the section provides that any company may "insure employers against loss in consequence of accidents or casualties of any kind to employees or other persons or to property resulting from any act of an employee, or any accident or casualty of any kind to persons or property, or both, occurring in or connected with the transaction of their business, or from the operation of any machinery connected therewith."

1. INSURANCE:  
indemnity  
against auto-  
mobile acci-  
dents: legality.

In our judgment the first of these two clauses can not

be so construed as to furnish authority for the issuance of the policy in question. It is true that it authorizes the insurance of persons "against personal injuries, disablement or death," and that any person may be so insured. But it is clear to us that such insurance is limited by the terms of the clause and by the chapter generally to personal injuries that are received by the insured himself. It authorizes insurance against accidents, but only against accidents that result in personal injury to the insured. We are aware of the fact that these limitations are not made by the express language of the clause, but we think a fair construction of the language used leads inevitably to the conclusion we reach. The policy sought to be issued by the appellant is one to indemnify the insured against liability that may be imposed by law for some negligent or wrongful act of his own. In other words, its purpose is to insure against a liability that might follow the insured's negligence, other than as an employer. There is a very decided difference between accident and liability insurance, and we think a clear distinction between the two classes was made by the Legislature in enacting subdivision 5 of section 1709. The second clause provides for liability insurance, but limits it to employers.

If the appellant's construction of the first clause were to obtain, it is manifest that the second clause would be useless, for the first clause would alone completely cover the ground, and, liability insurance having been provided for in the second clause, the statute is to be construed as prohibiting liability insurance not therein authorized. 36 Cyc. 1122.

The second clause of subdivision 5 does not in our opinion furnish the appellant any authority for its contention. It plainly and clearly provides for indemnity to an employer, and to an employer only. It provides that he may insure himself against liability arising from the act of his employee, but nothing more.

The appellant's claim that the policy in question should issue because of interstate comity can not be sustained. The state has the undoubted right to say whether foreign corporations shall be permitted to do business here at all, and, if such permission is granted, it may be upon such terms and conditions as the state shall prescribe. And, where it is the manifest intention to limit or restrict the powers given to such corporation by its charter, courts have no authority to override such legislation on the ground of comity between the states. Within its power, the state, through its Legislature, is supreme, and the court's duty is ended when it determines what the statutory law is. The Attorney-General urges that it would be against public policy to permit such insurance as the appellant proposes. If it is meant that it would contravene the declared policy of the state, we fully agree with the contention. But, if it is contended that sound, undeclared public policy demands a denial of such policies of insurance, we can not agree to the proposition. Out of the nearly 50,000 drivers of automobiles in this state there may be a few who are so careless and heedless about the lives and limbs of their neighbors as to be unworthy of any kind of protection. On the other hand, accidents may happen to the other large class of drivers, the men who are law abiding, and who are careful not to injure even a stray dog or an old hen that persists either in crossing the road just ahead of the car or under it, and this great majority of decent drivers should not be denied reasonable protection because of the recklessness of a few. As we have said, however, we think this insurance is not permitted under the present statute, and the judgment must, therefore be—*Affirmed*.

2. SAME: foreign insurance companies: interstate comity.

**THE FARMERS TELEPHONE COMPANY OF QUIMBY, IOWA,  
Appellant, v. THE TOWN OF WASHTA and Others,  
Appellees, and IOWA TELEPHONE COMPANY, Inter-  
vener, Appellant.**

**Municipal corporations: FRANCHISES: STATUTORY REQUIREMENTS:**

- 1 **PROOF OF COMPLIANCE.** Under the provisions of Code, section 683, 775, 776, a franchise to use its streets can only be granted by a majority vote of the electors of the municipality, at a regular or special election called for that purpose, which must be brought about by a submission of the question by a yea and nay vote of the council and the giving of notice; and the action of the council in authorizing a submission of the question, together with the election proceedings, must be shown by the records of the council to have been in conformity with the statutes, to establish the granting of a valid franchise; as no presumption will be indulged in favor of compliance with the statutory requirements, and parol evidence is not sufficient to establish that fact.

**Same: TELEPHONES: ESTOPPEL.** A municipality is not estopped from

- 2 relying on the invalidity of a telephone franchise, where for a number of years the company made no attempt to exercise its rights thereunder by the establishment of an exchange, except to maintain a toll line into the municipality; and a decree requiring the removal of an exchange constructed under the protection of an injunction, but permitting maintenance of the toll line, was proper as against the claim of estoppel.

**Same: TELEPHONES: STATUTES: FRANCHISE: CONDITIONS PRECEDENT.**

- 3 Code, section 2158, authorizing the construction of telegraph and telephone lines along public roads must be construed with reference to other provisions of the statutes on the same subject, and not as granting the absolute and unconditional right to occupy the streets and alleys of a municipality without its consent first obtained, as provided by sections 775, 776; for the power therein granted to cities and towns is not merely to regulate, but is to authorize or prohibit, and the procuring of a franchise from the municipality and its ratification by the electors are conditions precedent to the right to occupy its streets with a telephone system.

McClain, J., dissenting.

448 FARMERS TELEPHONE CO. v. WASHTA. [157 Iowa  
*Appeal from Cherokee District Court.*—HON. WILLIAM  
HUTCHINSON, Judge.

WEDNESDAY, NOVEMBER 20, 1912.

ACTION in equity. The nature of the controversy and the material facts are stated in the opinion.—*Affirmed.*

*J. D. F. Smith and Guernsey, Parker & Miller*, for appellants.

No argument for appellees.

WEAVER, J.—The facts, as we derive them from the abstract and amended abstract, are substantially as follows: In the year 1898, the Iowa Telephone Company, intervener herein, entered into negotiation with officers of the town of Washta, with the view of obtaining a franchise for the establishment and operation of a telephone exchange in that municipality. An ordinance, granting such franchise, was prepared and introduced into the town council, and it is the claim of the appellants that such ordinance was duly passed and became effective on May 16, 1898. The only record evidence of such passage shown in the testimony is found in the clerk's minutes of the proceedings of the council, and reads as follows: "Washta, Iowa, May 16, '98. Council met in spl. session, Mayor Marshall presiding. Members present: P. J. Kennedy, A. W. Bowers, Thomas Boothby, W. C. Ruff, A. B. Bushgens, and U. C. Rogers. Mov. and sec. that ordinance No. 33 be passed on first reading. Carried. Mov. and sec. rules be suspended and ordinance No. 33 be passed as to second and third reading. Carried. Mov. and sec. that ordinance No. 33 be passed as read. Carried. R. Sullivan, Clerk."

It is also the claim of appellants that this ordinance or grant was approved by vote of the electors of the town

at an election duly called for the purpose. The only record of the calling or holding of such election, or of its result, is found in a minute entered in the clerk's book as follows: "Washta, Iowa, August 5, 1898. At a special election held for or against the Iowa Bell Telephone franchise, held on above date, resulted as follows: For 29; against, none. R. Sullivan, Clerk, by G. E. McKee, pro tem."

It is further claimed by the intervener that soon after the date last above mentioned it executed a written acceptance of the terms of said ordinance No. 33, and sent the same by mail to the proper officers of the town.

The terms of said ordinance purport to grant to the Iowa Telephone Company the right for a term of twenty-five years to erect and maintain upon the streets, alleys, and public highways of the town a telephone system for the convenience of its people. In the fall of 1898, the intervener extended a telephone line from the city of Cherokee to the town of Washta. Subsequently, beginning at a point several miles out from the town of Washta, this line was connected with another, extending to Correctionville. No local exchange or switchboard was furnished, and the line as constructed and used was available only as a toll line for those who might wish to have communication with other towns covered by the Iowa Telephone Company's system. About October 1, 1907, the intervener executed to one F. L. Cooper a lease of the use of its "exchange located at Washta, Iowa," "together with the right to exercise the rights and franchises of the Iowa Telephone Company in maintaining, operating, and executing the rights and franchises of the Iowa Telephone Company in maintaining, operating, and executing said exchange," for a period of five years.

On April 8, 1908, Cooper, in writing, undertook to assign all his rights under said contract of lease to the Farmers' Telephone Company, of Quimby, Iowa, the plain-

tiff in this action. On April 13, 1908, this action was begun against the town of Washta and its officers, setting up said lease, alleging that the exercise of said company's rights under the lease are being interfered with by the defendants, and asking that they be restrained and enjoined from interfering with its poles and wires, and from in any manner obstructing the efforts of said plaintiff to extend, enlarge, and maintain its telephone system in said town. The defendants appear, and by answer deny that any franchise was ever in fact granted to the Iowa Telephone Company, and deny that the alleged ordinance No. 33 was ever properly enacted by the council, or approved by vote of the electors. They admit having interfered with and have forbidden the plaintiff to set certain poles and string certain wires which it was attempting to place upon the streets of the town, without lawful right, and in violation of the regulations duly prescribed by said town. The Iowa Telephone Company makes itself a party to this action by intervention, and in effect unites with the plaintiff in praying for an injunction, and to this petition the defendants plead practically the same defenses. The pleadings, which are very prolix and somewhat complicated, contain much other matter which, so far as necessary to be considered, will be mentioned later. The trial court found for the defendants, and dismissed both the original bill and the petition of intervention. Plaintiff and intervener appeal.

It should also be said that, pending the proceedings below, a temporary injunction was issued, under a protection of which the plaintiff set its poles, strung wires, and established a local telephone exchange, and that upon the final hearing the injunction was dissolved, and the plaintiff ordered to remove the wires and poles so placed, and to cease from any attempt to establish or operate such exchange.

I. The position of the appellants is that the dis-



puted ordinance No. 33 and the intervener's alleged acceptance thereof constitute a contract between the town and the intervener, and that by the lease to Cooper and the assignment above mentioned plaintiff has succeeded to the intervener's right to erect and maintain a local telephone system.

1. MUNICIPAL CORPORATIONS: franchises: statutory requirements: proof of compliance.

The power of the town to make grants of such franchises or to enter into contracts of that nature is of course such only as is conferred upon it by statute. At the date in question, the power and the manner in which it might be exercised had been fixed and defined by legislative enactment (Code, sections 775 and 776). By its terms, no franchise could be granted for the use of the public streets and ways, unless a majority voting thereon favor the same at a general election, or one specially called for that purpose. That vote is to be procured by an order of the council, submitting the question to be voted upon. Notice thereof is to be given in the manner and for the time specified in the statute, and the duty of preparing the ballot is placed upon the clerk. Except the brief memorandum already quoted, under date of August 5, 1898, the town records are wholly blank upon the proposition whether the council ever ordered the submission of the approval of this franchise to the voters, whether notice of such action was ever published as required by law, or whether such election was ever held. Moreover, the sole record of the passage of the ordinance, if passed at all, shows it to have been upon its first reading, under suspension of the rules; but neither upon this proposition nor upon final passage is there any record of yeas and nays, as the statute requires (Code, section 683), nor is it recorded that the vote was unanimous.

To aid this confessedly very imperfect showing, a witness was introduced, who testified that in 1898 he was publishing a paper in Washta, and produced a copy of said newspaper, containing what purports to be a printed report

of the proceedings of the town council, at which a motion was made for the calling of an election; but even this report, if otherwise competent, fails to show that said motion was ever put to the council, or voted upon by its members. The same paper also contains a purported copy of a notice of election, and it is admitted that this notice was published in said paper for four weeks ending August 4, 1898.

Testimony was also offered by two witnesses, who were members of the town council of 1898, who state their personal recollection that the vote upon passage of the ordinance was unanimous, and one of the members that at another meeting, of which there seems to be no record of any kind, an order for an election was also voted.

This and all other evidence extrinsic of the records of the town council was introduced subject to the objection of the defendants as to its competency. Other evidence offered, which we do not stop to specifically set out, does not, in our opinion, add to or detract from the strength of the plaintiff's case as developed in the recitation of facts already given. We regard it clear that there is a failure of proof of the granting of a franchise to the intervener, pursuant to the statute then and now in force. Whether such grant may be by resolution, or must be by formal ordinance, it can be validly enacted only by a vote in meeting duly assembled, upon which vote the yeas and nays must be "called and recorded." Code, section 683. No presumption can be indulged in this respect. *Olin v. Meyers*, 55 Iowa, 209; *Markham v. Anamosa*, 122 Iowa, 692; *Cook v. Independence*, 133 Iowa, 582; *Rich v. Chicago*, 59 Ill. 286. Nor can this omission be cured by parol evidence. *Cook v. Independence*, *supra*; *McCormick v. City*, 23 Mich. 457; *Stevenson v. City*, 26 Mich. 44; *Pickton v. Fargo*, 10 N. D. 469 (88 N. W. 90); *Morrison v. Lawrence*, 98 Mass. 219. It is the *recorded* yea and nay vote which the statute requires and not the mere fact of such vote. To hold that a fact which the statute provides shall

be made a matter of official record may be established by parol would amount to judicial repeal of a legislative enactment.

This is not an action to correct a record, nor is it a case of a lost record, of the contents of which secondary evidence is offered; but it is an attempt to establish a legislative act of a town council as it happens to be registered in the uncertain recollections of some of the members of that council ten years after date of the alleged act, and to give to this oral testimony the force and effect of a record which the statute specifically requires. This we are quite certain can not and ought not be done.

II. Appellants plead and argue that in any event, and whatever the rule may be in this respect, the town of Washta is estopped to deny the grant of the alleged franchise. We shall not stop to consider the

2. SAME:  
telephones:  
estoppel.

somewhat interesting question whether, in face of a statute restricting the power of a municipal corporation to grant franchises, such corporation, or the people of such city or town, may estop themselves to deny that statutory conditions precedent to the grant have been complied with. The claim of estoppel in this instance rests upon the theory that the town and its citizens have permitted the appellants to assume the existence of such franchise, and to expend money, time, and labor in exercising their supposed rights thereunder, all of which will be lost, if the decree below is upheld. We do not so understand the record. At the time this controversy arose ten years had passed since the attempted passage of the ordinance. During that time, appellants had exercised no rights thereunder, unless it be to string their toll line into the town, giving the people this opportunity of communication with such parts of the outside world as were served by the Iowa Telephone Company, but it had made no attempt to exercise any claim or right to establish a local exchange, or afford the people of the place the conveniences

of intercommunication by telephone. The decree below does not deny to the plaintiff or to the intervener the right to keep, maintain, or operate its toll line as it existed up to the time when the city denied their right to establish a local exchange and undertook to grant that right to a rival concern. The effect of the decree below, as we read it, is to restrict appellants to the maintenance and use of the toll line, and this would seem to be the utmost extent to which they can properly assert any right, even if it should be held that there is any equitable basis for their plea of estoppel.

III. It is finally insisted that the statute (Code, sections 775 and 779), does not operate to restrict appellants' right to establish or maintain a telephone system in the town of Washta, and that under Code, section 2158, they are authorized to place such system upon the streets of said town, without first obtaining a franchise therefor.

3. SAME: tele-  
phones: stat-  
utes: fran-  
chise: condi-  
tions precedent.

By section 775, cities and towns are given the power to "authorize and regulate" telephone, street railway, and other electric wires, and to provide the manner in which and the places where the same may be erected upon the public streets. The next section provides that no franchise shall be granted, renewed, or extended by any city or town, for the use of its streets, highways, alleys, or public places, unless a majority of the legal electors voting thereon shall favor the same at a general election or special election called for that purpose, and in the manner therein prescribed. The other statute referred to (Code, section 2158) is found in the chapter on telegraph and telephone lines, and reads as follows: "Any person or firm or any corporation organized for such purpose may construct a telegraph or telephone line along the public roads of the state or across the rivers or over any lands belonging to the state or any private individual and may erect the necessary fixtures therefor."

The point now made, if we understand counsel, is that the right conferred by this latter section to use the public roads, including streets of cities and towns, is absolute and unconditional, and that if there be any inconsistency between such provision and those contained in sections 775 and 776, the latter must yield. With an amendment enacted to include telephones with telegraphs, the provision above quoted from section 2158 of the Code of 1897 had its origin in the Code of 1851, section 780, and was repeated in the Revision of 1860 and Code of 1873. Specific provision for corporate authority over the streets of cities and towns is of somewhat later origin. As finally expressed in the Code of 1897, the municipal corporation is charged with the care, supervision, and control of all public ways within its limits (Code, section 753), and this authority extends to the opening, vacating, grading, paving, lighting, and otherwise improving such ways. Indeed, from the time when cities and towns were first authorized to incorporate and became, within defined limits, self-governing neighborhoods, the care and control of their streets have been quite uniformly regarded as coming appropriately within their special domain; and persons and corporations seeking to use such streets in the establishment of works of public utility or private profit have been quite generally expected to obtain the permission of and comply with the reasonable terms imposed by the city or town in whose jurisdiction the enterprise is to be launched. The right to so use the streets has been regarded a franchise, without a grant of which by proper municipal authority the proposed work could not be lawfully undertaken. What may be the limit, if any, of legislative power, throwing open all public streets and highways to the exploitation of works of real or alleged public utility, without franchise or permission from cities or towns affected by them, we need not here discuss. We may, for the purposes of this case, assume that under section 780 of the Code of 1851 and its subsequent

re-enactments, prior to the enactment of sections 775 and 776 of the Code of 1897, the builders of telegraph and telephone lines could rightfully erect their poles and string their wires on every street and alley in each and all of the cities and towns of the state, without regard to the wishes of the several municipalities; but we are satisfied that such power, if it existed, was materially narrowed by the later Code provisions to which we have made reference. The authority given by section 780 of the Code of 1851 and subsequent re-enactments thereof prescribe undoubtedly the general rule; but it is a rule from the operation of which cities and towns have been excepted or removed by the later legislation embodied in sections 775 and 776 of the present Code.

By the first of these, cities and towns are empowered to "authorize" the use of their streets for such purposes, and by the second the grant of such franchise is made subject to the ratification of the voters of the municipality. To say now that, notwithstanding this statute, the streets of such municipality are open to the entrance of every person or corporation which may be minded to try its hand at the maintenance of a telephone system, without permission of the constituted authorities or the approval of the voters is to nullify the legislative enactment. On the other hand, by treating Code, section 2158, as stating a general rule, which must be read and applied with due reference to limitations imposed by other statutes relating to the same subject all may be given due effect.

The case of *Chamberlain v. Telephone Co.*, 119 Iowa, 619, on which appellants place much reliance is not here a controlling authority. The telephone line or system there in controversy had been erected, and the rights of the company had vested, under a general statute substantially identical with the present Code, section 2158. This was, however, prior to the enactment found in Code, sections 775 and 776, and the effect of these provisions and the

authority and power thereby vested in cities and towns was in no manner discussed or considered. The one thing there considered was the construction of the general statute, authorizing persons and corporations to erect telegraph and telephone lines on all the public highways of the state; and it was held that the words "public highways" necessarily included city streets, and that the telephone company's rights therein were therefore not referable to any grant or franchise from the city. With the correctness of that decision upon the issue as there made, we have here no quarrel. What we hold is that the Legislature, having now expressly clothed the cities and towns of the state with power to authorize the use of its streets for such purposes, or, in other words, to grant franchises to telephone companies, and having further made the validity of such grants dependent upon their ratification by popular vote, it follows of necessity that a city or town, acting through its constituted authorities, may exclude from its streets the poles and wires of any company or system to which such permission has not been extended. It will not do to say that the extent of the authority given to cities and towns is merely to regulate, and not to authorize or prohibit; for, while it might be possible to torture that meaning out of Code, section 775, if it stood alone, it would leave the succeeding section utterly pointless and of no effect.

It is to be conceded that cases may be found, and they are cited by counsel, in which statutes, more or less similar to our own, have been shorn of their apparent effect, and construed as giving cities and towns no more than a power of supervision or regulation. The thought which seems to have influenced these holdings, and is pressed upon our attention in appellant's brief, is that, where the state—the repository of the sovereign power—has by general statute given telephone and other similar corporations the right to occupy the public highways with their poles and wires, it can not be presumed that the Legis-



lature intended to confer upon cities and towns the right or power to exclude them from their corporate limits.

We do not regard the reasoning by which this conclusion is reached as convincing or persuasive. It is a safe rule to assume that the Legislature means what it clearly says. The state may and does delegate certain of its powers to municipal corporations, and if, in its judgment, such corporations can best or most effectually control, improve, and protect the streets within their limits, and statutes to that effect are duly enacted, we know of no restriction in the Constitution or in principles of public policy which should impel the courts to construe away their obvious meaning. It was entirely competent for the Legislature to restrict the scope of the right or privilege which had been conferred by Code, section 2158, and this we think it did by the provisions of the later statute.

As we read the Code provisions to which we have adverted, they clearly contemplate that a grant or franchise from the city or town and its ratification by vote of the electors are conditions precedent to the right of any person or corporation to occupy the streets of such municipality with a telephone system. These conditions have not been met by the appellants, or either of them, and the trial court did not err in so holding. We think, too, that some weight should be allowed to the practical construction which has been placed upon the statute.

It is a matter of common observation that public utility corporations have quite universally accorded to the statute the effect which we here give to it; since it became the law of the state, they have sought and obtained entrance into the cities and towns of the state only by the method and under the restrictions imposed by Code, sections 775 and 776. Such was the intervener's own conception of its rights when it sent its agents to Washta to secure the passage of ordinance No. 33. The view thus indicated we hold to be the correct one. The opposite conclusion would



come as a surprise, not only to the profession and to the cities and towns of the state, but to the promoters and proprietors of telephone enterprises themselves, and result in an unfortunate increase of confusion and disharmony.

Other questions argued by counsel are rendered immaterial in view of our holdings upon the points already discussed. For the reasons stated, the decree of the district court is—*Affirmed*.

McCLAIN, J. (dissenting).—On one very material point I am unable to agree with the views expressed by the majority in this case. When the cases of *Chamberlain v. Iowa Telephone Co.*, 119 Iowa, 619, and *State v. Nebraska Telephone Co.*, 127 Iowa, 194, were decided, the statutory provisions in reference to the use of streets and roads by telephone companies were the same as they are now, and I fail to find in those cases any intimation that Code, sections 775 and 776, constituted a limitation on the powers of such companies as to the streets. As these sections of the Code are not set out in the majority opinion, I insert them here:

775. Cities and towns shall have the power to authorize and regulate telegraph, district telegraph, telephone, street railway and other electric wires, and the poles and other supports thereof, by general and uniform regulation, and to provide the manner in which, and places where, the same shall be placed upon, along or under the streets, roads, avenues, alleys, and public places of such city or town, and may divide the city into districts for that purpose.

776. No franchise shall be granted, renewed, or extended by any city or town for the use of its streets, highways, avenues, alleys or public places, for any of the purposes named in the preceding section, unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election.

It seems to me plain that section 775 was intended only to authorize cities and towns to regulate the manner in

which and places where the lines of telephone companies should be constructed through the streets. It is to be noticed that section 775 also relates to street railway and other electric wires, not authorized in the street by any general statute of the state, while telegraph and telephone companies are expressly authorized by the general statute, which, as construed in the two cases just cited, was applicable to streets, as well as to roads. Code, section 775, therefore applies in a general way to some lines of electric wires authorized to be constructed by general state statute and other lines not so authorized to be constructed; and it seems to me that, as to the lines authorized to be constructed under the general law of the state, this section amounts only to a grant of power to regulate. In view of this fact, Code, section 776, should be construed only as applicable to such lines of electric wires as could not be erected in the streets, save in pursuance of express authority from the city council. Even as to telegraph and telephone lines, a franchise might well be important; and if the council attempts to grant such a franchise it can do so only under the provision of section 776; but I can not read into the sections any intention to repeal the general law relating to the construction of such lines in "roads;" that term necessarily including streets. That such a limitation or repeal is not necessarily implied, and should not be read into the statute, is supported by a great number of cases so directly in point that I need only say with reference to them that they are distinctly contrary to the conclusion which the majority has reached. Among these cases are the following: *Wichita v. Old Colony Trust Co.*, 132 Fed. 641 (66 C. C. A. 19); *Northwestern Telephone Ex. Co. v. Minneapolis*, 81 Minn. 140 (83 N. W. 527, 86 N. W. 69, 53 L. R. A. 175); *Wisconsin Telephone Co. v. Oshkosh*, 62 Wis. 32 (21 N. W. 828); *Texarkana v. Southwestern T. & T. Co.*, 48 Tex. Civ. App. 16 (106 S. W. 915); *New Hope Telephone Co. v. Concordia*, 81 Kan. 514 (106

Pac. 35); *State ex rel. v. Red Lodge*, 30 Mont. 338 (76 Pac. 758); *State ex rel. v. Sheboygan*, 111 Wis. 23 (86 N. W. 657); *State ex rel. v. Milwaukee*, 132 Wis. 615 (113 N. W. 40); *Michigan Telephone Co. v. Benton Harbor*, 121 Mich. 512 (80 N. W. 386, 47 L. R. A. 104); *American Union Telephone Co. v. Harrison*, 31 N. J. Eq. 627; *Summit v. N. Y. & N. J. Telephone Co.*, 57 N. J. Eq. 123 (41 Atl. 146); *In re Johnston*, 137 Cal. 115 (69 Pac. 973); *Carthage v. Central New York Telephone Co.*, 185 N. Y. 448 (78 N. E. 165, 113 Am. St. Rep. 932). Quotations might be made from these cases, showing that the courts deciding them had for consideration the very question here presented; but I refrain from amplifying this dissenting opinion, deeming it sufficient to call attention to the construction which I think should be given to our statutory provisions in accordance with the practically uniform current of authority in other states, and, as I think, in exact conformity with the views entertained by this court in deciding the two cases referred to.

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JOHN H. TAFT and Others, Appellants, v. FRANK SNOUFFER ET AL., Appellees.

**Intoxicating liquors: PETITION OF CONSENT: REPUTABLE WITNESS.** A  
1 single illegal act of one obtaining signatures to a petition of consent to the sale of liquor, done several years prior to obtaining the signatures, is not alone sufficient to disqualify him as a subscribing witness thereto, under the statute requiring that the signatures shall be accompanied by the affidavit of some reputable person.

**Same: SIGNATURES TO CONSENT PETITION.** Where voters sign their  
2 names to a petition of consent to the sale of liquor in the same manner as they appear on the poll list of the preceding election, though not in their usual and correct form, such signatures are in compliance with the statute requiring that the petitioners shall be those voting at the last election, as shown by the poll lists.

*Appeal from Linn District Court.*—HON. W. N. TREICHLER, Judge.

TUESDAY, OCTOBER 15, 1912.

A PETITION of general consent for the sale of intoxicating liquors in the city of Cedar Rapids having been canvassed and found sufficient by the board of supervisors, an appeal from such finding was taken by the plaintiffs to the district court. Upon trial of said appeal, the petition was again adjudged sufficient, and plaintiffs have again appealed. The material facts are stated in the opinion.—*Affirmed.*

*M. S. Odle, and C. G. Watkins and L. M. Kratz, for appellants.*

*J. W. Jamison and John A. Reed, for appellees.*

WEAVER, J.—Cedar Rapids is a city of more than 5,000 inhabitants. At the last election preceding the filing of the petition of consent, there were cast 4,723 votes, as shown by the aggregate of the poll lists of the several precincts, and the signatures of at least 2,362 of these voters was essential to the sufficiency of such petition. As presented, and after deducting withdrawals and certain other signatures which were concededly not entitled to be counted, there remained 2,701 names, which appellees claim to be those of voters appearing upon the poll lists; and it is stipulated by the parties that if 2,362 of these signatures are valid, within the provisions of the statute, it constitutes a majority of the persons eligible to make such application. To overcome this apparent majority of 339, the appellants make the objection: (1) That 384 of the signatures to said petition were procured, witnessed, and verified by one W. W. Broukal, who is not a reputable person within the

meaning of the statute (Code, section 2452). (2) That 500 or more of the names attached to the petition are not the correct and proper names of persons voting at said last preceding election. These objections we shall proceed to consider separately.

I. The statute provides that every petition or statement of consent "shall be accompanied by the affidavit of some reputable person, showing that such person personally witnessed the signature of each name thereon." To sustain their objection that Broukal was not a person of this character, the plaintiffs offered proof that in the year 1902, in

1. INTOXICATING  
LIQUORS:  
petition of  
consent:  
reputable  
witness.

an action pending in the district court of Linn County, he had been adjudged guilty of maintaining a liquor nuisance and permanently enjoined from further participation in such unlawful business. This testimony was excluded by the trial court on the ground that proof of specific acts was inadmissible as evidence affecting a person's reputable character within the meaning of this statute, and upon the further ground the act or conduct charged was too remote in time. Upon this ruling error is assigned.

Whether the first ground of objection to the testimony was well taken we need not now consider or decide; for we are clearly of the opinion that the showing of a single illegal or disreputable act done or committed by Broukal nine years before the time when he attested the petition is not alone sufficient to disqualify him as a subscribing witness. This very question was before us in *De Board v. Williams*, 155 Iowa, 149, where we said: "The law recognizes that a man may repent of his past conduct and adopt a correct course of life; and we are not inclined to say that the lapse of six years, with proof that he had engaged in a lawful occupation during the past three years, was not sufficient to overcome the inference to be indulged that conditions once established are presumed to continue." In the absence of evidence, there can be no

presumption that Broukal has not obeyed the injunction then entered against him, or that he has been guilty of any new or other violation of the law of the state, or of the moral law. Indeed, the record tends to show that he has since been engaged in lawful business. Counsel say in argument that it was their purpose to follow up the offered evidence with further proof of unlawful and immoral conduct on part of this person extending down to the time of the trial, but were deterred from so doing by the ruling to which we have made reference. It is true that in stating their objections to the names on the petition certified by Broukal appellants charged that he had been guilty of criminal and disreputable conduct covering all said period down to the day of trial; but the record does not show that this objection was made good by any proof or offer of proof of such alleged facts. If they had testimony of this nature, it was their right to offer it in evidence and make proper record of such offer; but, having failed so to do, the question raised by the objection must be decided upon the facts actually shown or tendered in evidence.

II. The only other objection to the sufficiency of the petition grows out of the following admitted facts: In not less than 1,000 instances, the clerks keeping the poll lists at the last preceding election incorrectly recorded the names of persons who then and there appeared and cast their ballots. In many instances the error consisted in writing down the wrong initial letter or letters of a Christian name, as, for example, W. G. Dows voted at said election, but his name was written upon the poll list "W. H. Dows." In other instances either the Christian name or family name of the voter was incorrectly spelled. For example, one M. L. Alt voted at said election, but his name was recorded by the clerks as "M. L. Auld;" and another voter, Charles R. Jordon was recorded as C. R. Gordon. The voters here named, and many others of those incorrectly recorded as

2. SAME:  
signatures  
to consent  
petition.

aforesaid, signed the petition or statement of consent, and are included among the 2,701 persons subscribers thereto. In each instance, however, the voter so signing the petition wrote his name therein in the same manner and form in which it appears on the poll lists, and not in its usual and correct form. These signatures are challenged by the appellants, and upon the questions thus raised the decision of this appeal must turn; for it is conceded that in all respects, other than those discussed in this opinion, the proceedings have been regular and the petition sufficient.

In support of their objection to these signatures, we are cited by counsel to the statute (Code, sections 2448 and 2449), and its interpretation by this court in *Porter v. Butterfield*, 116 Iowa, 725, and *Wilson v. Bohstedt*, 135 Iowa, 451, and other cases of that class. A little examination will make it plain to the impartial mind that these authorities do not go to the extent claimed for them. The statute does provide that only those voters who voted at the last preceding election "as shown by the poll lists," and the decisions referred to do hold that these lists afford the sole criterion or test by which the names of persons so voting shall be ascertained. In cases of the class referred to, signatures have been challenged on the ground that no corresponding names appeared on the lists; and where any material discrepancy has appeared we have sustained the objection, and refused to admit extrinsic evidence to establish the alleged identity. But here there is no discrepancy. The name upon the petition corresponds in all respects with the name upon the lists, and we are asked to disregard it because the voter, in signing the petition, adopted the form or spelling of his name as it had been listed by the poll clerk. This is not denied; nor is it charged or claimed in pleading or in evidence that the person so signing the petition was not the same person who appeared and voted at the polls and was listed by that name. No fraud is charged against the poll clerks; nor is it charged

that the voter in any instance assumed, or attempted to, or did in fact, falsely personate any other person or voter, or gave to the poll clerks a false or assumed name; but it is conceded that in each instance the voter actually did vote, and that the name as listed was intended by the clerk for the name of such voter.

While it is not clearly shown, it may be assumed that those in charge of the canvass for signers to the petition, having in mind the statute and decisions above referred to consulted the poll lists in advance, and, when applying to a voter for his signature, took pains to have him write it to correspond with the form in which the poll clerk had recorded it. In so doing no one was wronged, nor any statute violated. In each instance the signer had voted at the last preceding election, and his name, varying in some respects from its true and proper form, was entered upon the poll lists. In each instance the name so listed was intended for the true name. In each instance the voter signed the petition by the name in which he was so listed. This is a literal compliance with the requirement of the statute for signatures of those "who voted at the last preceding election as shown by the poll lists." This holding does not, as counsel seem to fear, open the door to fraud, or enable an evilly disposed person to falsely adopt a name found on the poll lists, and thus acquire a pretended or spurious eligibility to become a signer of a petition of consent. It is just as easy for the evilly disposed to personate the voter who is listed by his correct name as one who is listed by a misspelled name. It being admitted that the signer of the petition is a legal voter of the city, that he did vote at the last preceding election, that he was listed by the poll clerk by a name intended to be his own, that he signed the petition or statement, and that his name so signed is identical with his name as recorded upon the poll list, every requirement of the statute is literally complied with. Indeed, even if a legal voter, in the absence of



fraud, votes under a name that is wholly assumed, and is so listed, we see no reason why he may not sign a petition of consent by the same name, provided that in so using such name he does not intend or attempt to personate any other voter. This is so manifest that argument can hardly make it clearer.

It follows that the judgment below is correct; and it is therefore—*Affirmed*.

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In the Matter of the Estate of MRS. JOHN BOYINGTON, commonly known as ELECTA J. POND, and MRS. EMILY P. JONES, v. H. L. WILLIAMS, Administrator, and JOHN B. BOYINGTON, Appellant.

**Marriage and divorce: COMMON LAW MARRIAGE.** Cohabitation and  
1 the reputed relation of husband and wife may be shown as tending to establish the relation of husband and wife and the mutual recognition of the existence of a marriage, the fundamental inquiry being the mutual intent of the parties, which will be established if it appears that they have lived together intending thereby to become husband and wife; but neither the intention nor consent  
2 to the status of marriage can be inferred from cohabitation alone, and reputation will only be considered as bearing on the question of intent.

**Same: EVIDENCE.** The evidence in this case is reviewed and held  
2 insufficient to establish a common law marriage, although tending to show cohabitation, and that in their business relations the parties acted in some respects as husbands and wives usually act.

**Same.** Where the evidence shows a divided reputation in the community on the question of a common law marriage it is without  
3 probative effect.

**Same: COHABITATION.** Where cohabitation in the beginning was  
4 illicit, affirmative proof of a present intention to assume legitimate relations as husband and wife is essential to establish a marriage. In the instant case no such intention is shown.

*Appeal from O'Brien District Court.*—HON. WM. HUTCHINSON, Judge.

FRIDAY, OCTOBER 18, 1912.

On the application of John B. Boyington, who is named in this proceeding as defendant, his codefendant, H. L. Williams, was appointed administrator of the estate of a woman who, during her lifetime, had been generally known as Electa J. Pond, but who, as alleged in the application was in fact his wife. Thereupon Mrs. Emily P. Jones, a sister of the deceased, petitioned the court to set aside the appointment of said administrator, alleging that John B. Boyington was not the husband of the deceased. By agreement of the parties, the court proceeded to determine the issue, which was tried as in equity, whether at the time of the death of the decedent John B. Boyington was her husband. Finding on the evidence that he was not such husband, the court set aside and canceled the appointment of H. L. Williams as administrator, and substituted in his place Emily P. Jones. From this order and decree, John B. Boyington appeals.—*Affirmed.*

*W. D. Boies*, for appellant.

*Herrick & Herrick*, and *O. H. Montzheimer*, for appellee.

McCLAIN, C. J.—Some time prior to the year 1893 Electa J. Pond, an unmarried woman, built a one-room shanty on a quarter section of land in O'Brien county, intending to perfect her title to it under the homestead laws of the United States. About the same time John B. Boyington, with a similar intention, erected a similar shanty on another tract of land not far distant in the same county. Each claim was contested. Boyington, who had occupied his shanty but two or three nights, moved it onto the land claimed by Miss Pond, and annexed it to her shanty in such form that together the two constituted one residence

of two rooms; and Boyington, who was a widower, lived continuously thereafter on the land claimed by Miss Pond. Whether she occupied this combined residence continuously with Boyington from that time, or whether she temporarily, after his coming there to live, stayed with her sister, Emily P. Jones, and her husband, who lived not far away, is a matter of some controversy, but Miss Pond claimed to have had a permanent residence on the land from the time she first built thereon, and it is conceded that from the fall of 1894, when a new house was erected on the land, both she and Boyington lived in that house until her death in 1907. At the time when they thus began unequivocally to live in the same house, Boyington was about fifty-nine years of age and Miss Pond about fifty-five. In 1896 Miss Pond's claim to the land under the homestead laws was approved by the Secretary of the Interior on the finding that she, as an unmarried citizen of the United States, had held possession thereof under her homestead entry. At the same time the claim of Boyington to the land which he had attempted to pre-empt was disallowed. In prosecuting these two claims each of the parties testified to being unmarried. In 1901 a patent was issued to Electa J. Pond for the land claimed by her, and duly recorded in the same year. The controversy in this case is as to the relation of these parties to each other from the time that Boyington commenced to live on Miss Pond's land. It is conceded that there was no evidence of any ceremonial marriage between them, nor of a written contract of marriage; but the claim of Boyington is that he and Miss Pond during their joint occupancy of the premises cohabited as husband and wife, were reputed to be living as husband and wife, and held themselves out as occupying that relation to each other, and that from these circumstances a presumption of present intent to be husband and wife is established so as to entitle him now to the rights of surviving husband; while the contention for the other

side is that a common law marriage is not established by the evidence, and that Boyington resided on the land only in pursuance of some arrangement by which he was to carry on the farm in the joint interest of himself and Miss Pond.

There is no substantial controversy between the parties as to the law in this state relating to common law marriages. It is well settled that, while cohabitation and

1. MARRIAGE  
AND DIVORCE:  
common law  
marriage.

the reputed relation of husband and wife may be shown as tending to give color to the relation of the parties and the recognition each by the other of the existence of a marriage between them, the fundamental question is whether their minds have met in mutual consent to the status of marriage which will be sufficiently established if it appears that they have lived together, intending thereby to be husband and wife. Neither such intention nor consent can be inferred from cohabitation alone, and reputation is of no significance, save as it has a bearing on the question of intent. Supporting this statement of the law as it has been recognized by this court, see *Brisbin v. Huntington*, 128 Iowa, 166; *State v. Rucker*, 130 Iowa, 239; *McFarland v. McFarland*, 51 Iowa, 565; *Pegg v. Pegg*, 138 Iowa, 572. It will be important, therefore, to examine the evidence relied upon for appellant, first, as to cohabitation; second, as to the general conduct of the parties toward each other in their relations with the public bearing upon the question of whether they held themselves out to the world as being husband and wife; and, third, as to the general repute in the community with reference to whether they were living together as husband and wife or in some other relation.

The evidence for the appellant tended to show that these parties cohabitated—that is, that they lived together

2. SAME:  
evidence.

in a manner which would be unlawful if they were not husband and wife—and, in the view which we take of the case, discussing it solely with

reference to the evidence for the appellant, we may concede that cohabitation is established. We may concede, also, that in their business relations with others they acted in some respects as husbands and wives usually act. No distinction was systematically maintained as to liability for debts incurred by either of them. They frequently consulted together in the making of purchases, not only of machinery and improvements for the farm, but also of articles of clothing; and apparently all expenses were met out of some common fund into which all the income from the farm operations was turned. With the consent of each merchants credited the produce of the farm when disposed of to the account of one or the other as they saw fit, and no objection was made by either to charges entered on his or her account for purchases intended for the other. Boyington was allowed to make sales of the produce of the farm and of the stock kept upon it according to his own judgment, but usually as the result of a consultation with Miss Pond. Nevertheless Miss Pond continued until the time of her death to transact business in her maiden name, and all instruments requiring her signature appear to have been signed by her in that name, either personally or by Boyington, purporting to act for her and under her authority. In 1897 a tract of land in Dakota was conveyed by warranty deed to "E. J. Pond." In 1902, a deed of the same land was executed by "E. J. Pond" to a purchaser. On various dates between 1894 and the time of her death receipts, checks, and notes were signed by "E. J. Pond," individually or with that name "per John Boyington." Promissory notes payable to "E. J. Pond" were signed by J. B. Boyington; one of such notes being secured by chattel mortgage on certain animals. These instruments are referred to simply as showing that in this respect, at least, neither of the parties was announcing to the world the existence of the relation between them of husband and wife. So far as we can discover, Electa J. Pond never,

by any written signature or in any business transaction, indicated that she was or claimed to be Mrs. Boyington.

In social matters the apparent relations of these parties remained throughout somewhat ambiguous. Boyington took Miss Pond on a few occasions to places of public resort such as lectures, dances, and church sociables, and, when they were thus seen together, the conduct of Boyington seemed to be such as to indicate a desire on his part to be agreeable to Miss Pond. But they practically never made or received visits, and the only persons who appeared to have ever eaten meals with them were hired helpers and people who came on business errands. To those who came to the house occasionally without knowing anything about the nature of the relations of these parties to each other they seemed to act as husband and wife might, but no one testifies to their addressing each other as husband or wife, or in any way definitely indicating that relation. Boyington called Miss Pond, "Electa," and she called him "John" or "Boyington." On two occasions, explaining to strangers the presence of Miss Pond in the house, he said "this is my woman," and the stranger in each instance, inferring the words to indicate that they were husband and wife, addressed her as Mrs. Boyington without protest on her part. But she was not thus addressed by neighbors and business people who were familiar with the situation. When addressed as Miss Pond, she never made any effort to deny the imputation that she was not married. Not long before her death, Boyington spoke of her to a woman who came to help about the house as "Miss Electa Pond," and that woman raised a question as to their relations without receiving any assurance that they considered themselves to be husband and wife. Another witness testified that as a lawyer he was consulted by the parties jointly, not long before the death of decedent, as to a proposed disposition of their property by which the survivor should have all; but on this occasion Boyington introduced the woman to this

witness as Miss Pond. We find no evidence that he ever introduced her as Mrs. Boyington or as his wife. Witnesses were interrogated as to whether these parties used terms of endearment to each other, or terms indicating relationship such as husband and wife would be likely to use, but no such fact was developed, save in one instance of a neighbor who testified that Boyington came to his house when intoxicated, having lost his way, and, when the witness took him home, Miss Pond met them with the exclamation, "John, you are drunk again," to which Boyington replied, "Now, dear Electa, I will never do it again." This witness testifies that he had been at their house frequently, and neither of them ever in his presence addressed the other as husband or wife, and that, although he himself sometimes addressed her as Mrs. Boyington and sometimes as Miss Pond, Boyington himself never addressed her as Mrs. Boyington. It is also significant that when Boyington's daughter by a former marriage, whom he had abandoned in Illinois twenty years before, when she was but seven years of age, her mother being then deceased, came to visit her father, and found him living with Miss Pond in ambiguous relations, Miss Pond said they were not married, and explained that "on account of the land" they had never been married, though they had been living as man and wife, sharing equally in the profits of the place. Just how far the testimony of this witness on cross-examination as to declarations of Miss Pond was competent we need not determine. We regard it as significant that this witness for appellant, though testifying on direct examination that Miss Pond negatived any marriage, did not speak of any mutual recognition of an existing marital relation.

In the matter of repute there was a divided opinion in the community. It seems to have been generally assumed that there had never been any regular marriage. Some people thought that they were living in illicit relations. It was generally conceded by the

3. SAME.

witnesses that the circumstances under which they were living were suspicious, and were so regarded by all who knew them. As already indicated, reputation is important only as bearing upon the intention of the parties in living together, *Cross v. Cross*, 55 Mich. 280 (21 N. W. 309), and a divided reputation has no probative force. *Eldred v. Eldred*, 97 Va. 607 (34 S. E. 477; *Taylor v. Taylor*, 10 Colo. App. 303 (50 Pac. 1049); *Jackson v. Jackson*, 80 Md. 176 (30 Atl. 752); *Williams v. Herrick*, 21 R. I. 401 (43 Atl. 1036, 79 Am. St. Rep. 809); *McKenna v. McKenna*, 180 Ill. 577 (54 N. E. 641).

It is contended for appellant that the division in general repute as to the relations of these parties was due to a misunderstanding as to what was meant by marriage; those who thought that the parties were not married believing that a ceremonial marriage was necessary. But the record does not adequately sustain this contention. It appears without substantial controversy that there was a well-founded belief in the community that these parties were living together in illicit relations; that is, although cohabiting, they were not husband and wife.

The term "cohabiting as husband and wife" is ambiguous. It may mean cohabitation under the assumption of the relation of husband and wife, or it may as well mean, without regard to any such actual relation, in the manner of cohabitation as between husband and wife. As already indicated, the fact of cohabitation alone, no matter how continuous, is not sufficient in itself to give rise to the presumption of marriage. There is an attempt, also, to explain the failure to enter into a formal marriage by reference to the fact that Miss Pond could not, as she was advised, perfect her homestead claim in her own name or otherwise if she became a married woman before obtaining complete title to the land. In other words, it is the contention of the appellant that, while marriage in fact existed between him and Miss Pond while she occupied the



land as a homesteader, she concealed that fact, and falsely testified in the proceedings before the Land Department in order to perfect her claim.. This theory would be more plausible if, after she obtained title to the land, five years subsequently to the recognition of her right as homesteader by the Land Department, she had asserted to the whole world in some unmistakable manner that she was the wife of Boyington in pursuance of a prior marriage, though clandestine, or had then entered into a formal marriage with him. In view of the doubt which she must have known to exist in the community with reference to her relations with Boyington, arising, if in no other manner, from her knowledge of the fact that, though living continuously with him in the same house, she was using her maiden name, we think it would have been in accordance with the promptings of a woman's instinct to either declare in some public way, by the subsequent use of her married name in business instruments, if not otherwise, that she was in fact Boyington's wife, if that was the fact, or to make that fact clear by a formal marriage, to which there was no impediment whatever. No excuse is suggested for the failure on the part of these parties to make clear their marital relations, if any such existed; on the contrary, for five or six years after every reason for concealment had ceased, they continued as before their ambiguous relationship.

The purpose and intention of Boyington in his relations with Miss Pond were of the greatest importance as bearing on the fact of a marriage. No doubt as a witness he would have been incompetent to testify to any transactions or communications with the deceased amounting to a mutual agreement to marry, but he was not incompetent to testify as to his own purposes and intentions and the circumstances under which their cohabitation was begun and continued, yet as a witness he failed to give any explanation whatever of their ambiguous relations. He tes-

tified as to his going to live on the land in 1893, and to living alone there with Miss Pond in 1894, and continuously thereafter until her death; to his managing the farm and contracting in regard to the improvements thereon; to going with Miss Pond in a single wagon to South Dakota where she owned land; to the absence of any legal impediment to a marriage between them; to the value of his services in such management, and to his personal care of her in the sickness which preceded her death; but he nowhere testifies that he lived on the place with the assumption or in the belief that he was the husband of Miss Pond, or that he held her out publicly as his wife, or that she was generally regarded as his wife by the community, and he nowhere testifies that either at the beginning or during the continuance of his relations with her was there any assumption on his part of marriage. He does testify that with Miss Pond he consulted lawyers as to the effect which marriage would have on the validity of her homestead claim, and that while riding with another witness on the return from South Dakota he and Miss Pond talked about getting married, and in this he is corroborated by such other witness; but he gives no explanation of the failure to carry out this intention. The same witness testifies that on another occasion on a train they spoke of an intention to get married.

But it is well settled that, where cohabitation is in its beginning illicit, affirmative proof of a subsequent present intention to change that relation into the legitimate relations of husband and wife is essential to establish a marriage. *Henry v. Taylor*, 16 S. D. 424 (93 N. W. 641); *Terry v. White*, 58 Minn. 268 (59 N. W. 1013); *Grimm's Appeal*, 131 Pa. 199 (18 Atl. 1061, 6 L. R. A. 717, 17 Am. St. Rep. 796); *Weidenhoft v. Primm*, 16 Wyo. 340 (94 Pac. 453).

4. SAME:  
cohabitation.

To our minds the evidence introduced in behalf of the appellant, disregarding entirely the evidence offered for

the appellee, falls far short of affording a satisfactory basis from which to infer that there was at any time a present intention on the part of Boyington and Miss Pond to assume toward each other the relations of husband and wife, and we reach the conclusion, therefore, that the finding of the trial court that no such relation existed was correct.

The decree is, therefore,—*Affirmed.*

LADD, J., takes no part.

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STELLA W. MILLS, Appellee, v. BERT FLYNN, Appellant.

**Slander and libel: PLEADINGS: AMENDMENT: CONTINUANCE.** It is al-

1 ways permissible to amend a pleading to make it conform to the proof; and where the original pleading fully advised defendant of the nature of an alleged slander, an amendment making but a slight change in the language complained of, without altering its sense, was not ground for continuance.

**Same: EVIDENCE.** In an action for slander on the ground that de-  
2 fendant had charged plaintiff with being afflicted with a loathsome disease, it was proper for plaintiff, in her main case, to show that she had never been thus afflicted, although defendant did not justify by pleading the truth of the charge.

**Same.** The admission of evidence by plaintiff as to the number and  
3 ages of her children, and that they were healthy, on the promise of counsel to make it competent by medical testimony, was not a matter of which defendant could complain, where the same was stricken from the record because of failure to produce the medical evidence.

**Same.** Under proper allegations in an action for slander the plain-  
4 tiff may show, in support of special damages, that she suffered mental pain, humiliation and disgrace from the breaking up of church and social relations, as a result of the alleged slander; as bearing on its effect on her own personal feelings, but not upon the feelings of others toward her.

**Same.** The plaintiff in a slander action can not show the effect of  
5 alleged slanderous words by detailing specific instances, but may

show the effect of slanderous reports without strict proof connecting the same with the slander of the defendant.

**Same: INSTRUCTIONS.** The instruction in this case that the jury  
6 should not consider the attitude toward plaintiff taken by members of societies to which she belonged, because their attitude was not sufficiently connected with the alleged slanderous statements of defendant, cured any error in the admission of evidence of rumors that plaintiff was afflicted with an incurable disease, with which defendant may not have been connected.

**Same: MITIGATION OF DAMAGES: EVIDENCE.** Where there was evi-  
7 dence that defendant knew of the falsity of rumors to the effect that plaintiff was afflicted with an incurable disease, prior to the time he made a like charge, and he made no claim that he merely repeated such rumors, and there was no evidence that he did so without malice and believing them to be true, evidence that certain persons had stated that plaintiff was so afflicted was not admissible in mitigation of damages.

**Same.** The defendant in a slander action can only show in mitiga-  
8 tion such rumors as were in circulation before his statements were made; under no circumstances can he show subsequent rumors.

**Same: MITIGATION: INSTRUCTION.** Where the defendant made no  
9 request for an instruction on the subject of mitigation, and made no complaint that one was not given by the court, the matter will not be considered on appeal.

**Same: DAMAGES: INSTRUCTIONS.** The defendant in an action for  
10 slander can not be held liable for a repetition by others of slanderous statements made by him, unless he made them with the intention and expectation that they would be repeated, or under such circumstances that it would be likely that the hearer would repeat the same in the course of duty; and an instruction permitting the jury to consider a repetition of his slanderous statements as bearing on the question of plaintiff's damage, unless made under such circumstances, is erroneous.

**Same.** The defendant's pecuniary circumstances and standing in  
11 society are matters which may be considered in determining the damages which plaintiff in a slander action ought to recover.

*Appeal from Washington District Court.—HON. BYRON W. PRESTON, Judge.*

MONDAY, OCTOBER 21, 1912.

ACTION for slander. Defendant denied the alleged slander and pleaded certain facts in mitigation, which need not be here set forth. On the issues joined, the case was tried to a jury, resulting in a verdict and judgment for plaintiff in the sum of \$4,000, and defendant appeals.—*Reversed.*

*Marsh W. Bailey, and Wade, Dutcher & Davis*, for appellant.

*Ranck & Bradley, and Eicher & Livingston*, for appellee.

DEEMER, J.—Defendant is a retired farmer living at the time of trial at Riverside, Iowa. He was the owner of a farm near said town, and at the time it is claimed the alleged slanderous words were spoken plaintiff and her husband were his tenants, and as such were living upon the farm. It is claimed in the petition, which is in three counts, that during the years 1908 and 1909 the defendant spoke of and concerning the plaintiff the following false and slanderous words:

Mrs. Mills will never get any better, as she has a disease which is incurable, and which she has caught from her husband, Frank Mills, and he caught it somewhere else. Mrs. Mills is afflicted with the gonorrhœa and syphilis, and you know what that is. She will never get well.

Mrs. Mills will never get any better as long as she lives with that man; she will never get well; she has a bad disorder that she caught from him, and he isn't fit for to have a woman. She has a venereal disease known as the syphilis and clap. . . .

The Mills have the syphilis. They have it bad, and are in bad shape. They will not get well.

These separate statements being found in the respective counts of the petition. At the close of plaintiff's testimony she was permitted, over defendant's objections, to

amend the first count of her petition to conform to the proof, and in this she alleged that, in addition to the alleged slanderous statement made by defendant as charged in the first count, he said: "Mrs. Mills has the pox; she will never be any better. She is rotten with the pox."

Defendant denied the alleged statements, and pleaded that it was currently reported in the neighborhood where plaintiff lived that she and her husband had syphilis, or some other venereal disease; that because of their occupancy of his farm he was interested in knowing the facts, and that he made inquiries concerning the matter and heard these various rumors and reports; that he did not repeat the same, save as he was making inquiries with reference to the truth thereof; and that he had no other motive than to ascertain their truth. These facts were pleaded both in justification and in mitigation. Upon these issues the case was tried, with the result above indicated. Something like fifty-two errors are assigned; but, as the argument is confined to something like nine principal propositions, we shall confine our attention to the points there made.

I. It is claimed that the court was in error in permitting plaintiff to file the amendment to her petition to conform the pleadings to the proof, and that in any event

1. SLANDER  
AND LIBEL:  
pleadings:  
amendment:  
continuance.

the trial court erred in not granting defendant a continuance to meet the issues tendered thereby. Neither proposition is tenable. It is always permissible in such cases for one to amend in order to make the pleadings conform to the proof, and, as the testimony was in the record and did not depart substantially from the charge as originally made, there was no error in permitting the amendment. The amendment did no more than slightly change the language said to have been used by defendant to Tobin and others, and gave the date as in February, instead of January. Defendant was fully advised by the original pleading as to the nature of the slander and as to whom uttered, and no

reason is shown why a continuance should have been granted. The only showing is that counsel never had heard it claimed that defendant said plaintiff had the pock, and that he had no opportunity to examine as to the nature of the disease, or whether or not plaintiff was afflicted with it, and had no opportunity to prepare for trial on that issue. He surely was advised of the claim that defendant had said plaintiff had syphilis, gonorrhœa, and clap, or other venereal disease, and assuming, as we must, his knowledge of the use of terms, it must be assumed that he knew that pock is but another name for syphilis, or what has been called "French or Spanish pox." Webster's International, "Pock." It is well known that among a certain class of people "pock" is a synonym of "syphilis." See Webster's International, word "syphilis." Surely there was no reason for a continuance.

II. Over defendant's objections, plaintiff was permitted to prove as a part of her main case that she never had any of the diseases with which she was charged. It

2. SAME:  
evidence.

is true that defendant did not justify by pleading the truth of the charges, and it is also true that plaintiff was not required to negative the truth; for the law presumes that the party charged was not so afflicted. But we have held in several cases that it is not error for plaintiff to prove that the charge was untrue. *Locke v. Chronicle Co.*, 107 Iowa, 391; *Moffitt v. Chronicle Co.*, 107 Iowa, 407; *Berger v. Publishing Co.*, 132 Iowa, 293.

III. Plaintiff was permitted, over objections by defendant's counsel, to testify as to the number and ages of her children, and that they were present in court, and were

3. SAME.

each and all healthy. This was done under promise of counsel to make the testimony competent by medical evidence. This they failed to do, and on motion of defendant's counsel the testimony was stricken

from the record for failure to furnish this proof. Surely there was no error here of which defendant may complain.

IV. In her petition plaintiff alleged that she suffered special damages as follows: "That by reason of the speaking of the said false, malicious, scandalous, and de-

4. SAME.

defamatory words, well knowing at said time that the same were false, the plaintiff has been greatly injured in her good name and character, deprived of social intercourse among her neighbors and in the community in which she resides, brought into public scandal and disgrace, suffered much mental pain and anguish, and sustained a severe nervous shock upon learning of the said false statement made by the said defendant. That by reason thereof the plaintiff has sustained damages in the sum of \$2,500, no part of which has been paid." She offered testimony in support of these allegations, and was permitted, over objections of defendant, to testify to the breaking up of her church relations and to a general social ostracism. It is said that this testimony was not admissible, because the results were in no manner traced to defendant. It is true, of course, that defendant is not chargeable with slanders or rumors uttered by others, and for which he was in no way responsible. *Schaffhauser v. Hemmer*, 152 Iowa, 204; *Olmsted v. Brown*, 12 Barb. (N. Y.) 657; *Kersting v. White*, 107 Mo. App. 265 (80 S. W. 730).

But it is also true that testimony as to mental pain, and suffering, humiliation, and disgrace are all proper elements of damage, and may be shown under proper allegations. *Davis v. Mohn*, 145 Iowa, 417. The court admitted the testimony for this definite purpose: "By the Court: It is admitted for the purpose as indicated by counsel for which they offer it, to wit, as it may have a bearing, if at all, upon the feelings of the plaintiff, and not upon the feelings of the others toward her." The examination of the witness continued in this manner:



Q. Did you at any time learn that the defendant had reported in the vicinity of Riverside, in which you then resided, that you had syphilis? A. I did. Q. About when did you hear this? A. It was the 1st of September two years ago. It will be two years next September. That would be the 1st of September, 1909. It was shortly after I heard it. Q. How did the information of Mr. Flynn's publication of these charges affect you? A. I can hardly express it. It was so terrible. It is a terrible thing to be accused of. I can't tell you how I felt. I walked the floor at night; couldn't eat; couldn't sleep; and I couldn't do anything. I felt that I must be vindicated. I felt that I should die, and I felt I couldn't die; for if I would die I would leave this on my children, and if I would it would come back. I didn't know what to do. Q. How did it affect your emotions as to crying or otherwise? A. I should think it did. I had a complete nervous breakdown. I suppose it was foolish. Q. What effect did this have upon you when you met your friends and neighbors afterwards? A. I didn't meet them very often, because I wouldn't go any place. I felt that I was watched, and I couldn't go feeling right and comfortable.

Upon cross-examination, she was asked regarding the treatment and conduct of certain parties toward her and as to what they said; and as to this the defendant, of course, can not complain. Finally, the following record was made:

Defendant now moves the court to strike from the records all the testimony tending to show any ill treatment towards the plaintiff, or any shunning of the plaintiff by the members of any of the lodges or societies or clubs to which the evidence shows she belonged, for the reason that there is no testimony tending to show that the defendant is in any way responsible for such treatment. Second. The defendant moves to strike from the record all the evidence tending to prove ill treatment of plaintiff by any person or persons other than the witness Tobin and the witness Herring, for the reason that there is no evidence in the record which would justify the finding that the defendant is in any way responsible for such treatment. The defendant moves to strike from the record all the evidence of rumors of the

report that the plaintiff was afflicted with the disease or diseases alleged in the petition, for the reason there is no evidence that would justify a finding that the defendant is in any way responsible therefor. By the Court: My idea that the record is in such shape that the motion can not be sustained. The court sustained the objection to plaintiff's questions in reference to the treatment by the church people, etc.; but some of the testimony in reference to these matters was brought out on cross-examination—matters, perhaps, having a bearing, as the court supposed, at least at that time, on other issues and without objection on the part of the plaintiff; and, perhaps, some of the matters at which the motion strikes were not responsive and volunteered by the witness, and for those reasons the court's idea is that the record is in such shape that the court can not now and ought not now to sustain it, but those matters will be controlled by the court in an instruction to the jury in reference to these matters.

The promise made by the court to instruct will be dealt with in another paragraph of the opinion. That plaintiff may show her mental suffering is well settled by authority. *Nott v. Stoddard*, 38 Vt. 25 (88 Am. Dec. 633); *Laing v. Nelson*, 40 Neb. 252 (58 N. W. 846); *O'Toole v. Publishing Co.*, 179 Pa. 271 (36 Atl. 288); *Schulze v. Jalonick*, 14 Tex. Civ. App. 656 (38 S. W. 264); *Schomberg v. Walker*, 132 Cal. 224 (64 Pac. 290); *Terwilliger v. Wands*, 17 N. Y. 54 (72 Am. Dec. 420); *Chesley v. Thompson*, 137 Mass. 136.

Plaintiff, no doubt, should not be permitted to detail specific instances, but undoubtedly may show the effect of the reports without strict proof connecting the current report with the slander of the defendant; the  
5. SAME. fact of such connection being for a jury, and not for the court. *Rice v. Cottrel*, 5 R. I. 340; *Moor v. Stevenson*, 27 Conn. 14.

Aside from this, however, the trial court gave the following instruction: "(13) You are instructed that in arriving at the amount of damages, if any, against the de-

fendant, you will not take into consideration the attitude toward the plaintiff by the members of the different lodges or societies to which plaintiff belonged, for the reason that the evidence has not connected such matters with the alleged slanders claimed by plaintiff to have been spoken by the defendant." This cured any errors in the admission of the testimony and properly limited the effect thereof.

6. SAME:  
instructions.

V. Defendant made the following offer of testimony:

By Counsel for Defendant: Defendant offers to prove by the witness Maud Carr that in August, 1908, she went to the State University Hospital at Iowa City and remained there as a nurse until October, 1908; that on the evening of the first day when she went there, while at the nurses' home, when it became known by the nurses that the witness Maud Carr was from Riverside, they asked her if she knew Mrs. Mills, and she said that she knew her; that the nurse then stated to her that Mrs. Mills had been in the hospital for treatment; that she was afflicted with the syphilis; that the said statement was made by the nurse in the presence of the witness and three or four nurses; that there were at that time more than twenty nurses in the hospital; that thereafter the witness Maud Carr, in the month of October, went down to Riverside, and there heard the rumors from people in Riverside, in said month of October, that the plaintiff was afflicted with a venereal disease or syphilis, and was asked by witness whether or not such statements were true, and the witness Maud Carr stated to them that she had been told by the nurses in the University Hospital that they were true; that said witness was called to the office of Dr. Blythe, who stated to her that it had been reported to him that she was circulating the report that the plaintiff had a venereal disease.

7. SAME:  
mitigation  
of damages:  
evidence.

The following record was made on this offer:

Plaintiff objects to the offer as immaterial, irrelevant, incompetent, and hearsay. Counsel for defendants say this offer is not made with reference to the impeaching question to Dr. Blythe. By the Court: This testimony might be

admissible, perhaps, on one theory, if these rumors were communicated to the defendant prior to the alleged speaking of the words in the petition, on the question of his good faith in some other matters; but counsel for defendant have stated in open court that they do not rely upon the claim in this case on the question of privilege, and the court considers such issues thereby withdrawn and relies upon such statement, and, there being no offer or nothing in the offer by which the defendant expects to make the connection above referred to, the offer is denied. And a further reason for denying the testimony is that it is not claimed by defendant or shown in the offer that defendant knew of the rumor or report at the time of the alleged publication of the matters set up in the petition, or that defendant, in saying what he did, if he said anything, gave the rumor as his authority. Defendant excepts.

Another offer was made as follows:

Defendant offers to prove by witness Laura Godlove, a resident of Riverside, Iowa, residing there in 1908, that on August 10, 1908, she went to the University Hospital at Iowa City for an operation; that while there she was told, in the month of August, 1908, by the nurse in the hospital that the plaintiff was afflicted with the syphilis; that one of the nurses who told her was named Miss Shillar; that Miss Shillar told her that both Mr. Mills and Mrs. Mills were treated in that hospital for gonorrhœa; that Mrs. Godlove, upon inquiry after her return to Riverside, told various persons what she had heard at the hospital.

The record made here was as follows: "Plaintiff makes the same objection; same ruling. Defendant excepts."

The rulings are complained of. It is claimed that the testimony was admissible in mitigation of damages and to show want of malice on defendant's part. That there are cases so holding, we have no doubt. But the rule for this state, as announced in the cases, is as follows:

The defendant pleaded in mitigation of this charge, in substance, that there were a great many reports in the neighborhood where the plaintiff resided, which came to

defendant's knowledge, that the plaintiff was a woman of unchaste character, and that it had been reported to him that the plaintiff had been guilty of specific acts and conduct, which were set out, which tended to show that she was of unchaste character; and that he, without malice, repeated such reports. But it was not pleaded that the defendant gave his authority, or even stated that he had been so informed, when he spoke the words. We understand the rule to be that when the libel does not, on the face of it, purport to be derived from any one, but is stated as of the witness' own knowledge, then evidence is wholly inadmissible to show that it was copied from a newspaper, or communicated by a correspondent. Odgers, Lib. & Sland. 303. 'Particular acts or instances of misconduct can not be proved, nor rumors and reports, unless they are so general and prevalent that they have affected the general character.' 3 Suth. Dam. 679; *Forshee v. Abrams*, 2 Iowa, 571; *Fisher v. Tice*, 20 Iowa, 479; *Fountain v. West*, 23 Iowa, 9; *Marker v. Dunn*, 68 Iowa, 720.

Again, in *Hanners v. McClelland*, 74 Iowa, 318, we said: "Defendant was permitted to prove the general reputation of plaintiff for chastity. Did the court err in not permitting him to prove the alleged rumors or reports? Evidence to prove the acts themselves was not admissible, because they were not pleaded, if for no other reason. Code, section 2682. Defendant does not, in his answer, claim that he believed the alleged rumors to be true at the time in question, nor even that he knew of them. The only purpose of proving them would be to mitigate damages by rebutting presumptions of malice. But if defendant did not know of them, or, if knowing of them, he did not believe them to be true, they could not affect the question of malice, and therefore would have been improper and prejudicial. 1 Hil. Torts, 394, note, 403; *Pease v. Shippen*, 8Q Pa. 513 (21 Am. Rep. 116); *Peterson v. Morgan*, 116 Mass. 352; *Lothrop v. Adams*, 133 Mass. 476 (43 Am. Rep. 528)." See, also, *Berger v. Publishing Co.*, 132 Iowa, 293; *Bearsley v. Bridgman*, 17 Iowa, 296; *Clif-*

*ton v. Lange*, 108 Iowa, 475; *Wallace v. Homestead Co.*, 117 Iowa, 356.

There is direct testimony in the case to the effect that defendant knew the alleged rumors were untrue long before he uttered them; and no claim is made that he was simply repeating the rumors he had heard. The alleged plea in mitigation is defective, and does not go to the extent claimed by appellant. *Bearsley v. Bridgman*, 17 Iowa, 296. It does not show a repetition without actual malice, does not give the author, or state that defendant believed the words to be true and uttered them without malice. The only mitigating circumstances pleaded are that there were rumors that plaintiff's husband was afflicted with the disease known as syphilis, or some other venereal disease, and that he simply made inquiries with reference thereto.

Again, it is previous, and not subsequent, rumors which defendant may show in any case. *Hinkle v. Davenport*, 38 Iowa, 355. According to the testimony, defend-

8. SAME. ant started the reports before any of the witnesses whose testimony was offered were at the town of Riverside; and there is also testimony to the effect that he was told by plaintiff's physician that they were untrue.

VI. Failure of the court to instruct on the question of mitigation is one of the errors alleged. No request

9. SAME: mitigation: instructions. for such an instruction was made by defendant, and no complaint of failure to give one was made in the trial court. It is too late to now present the matter. *Hall v. Manson*, 90 Iowa, 585.

VII. Nos. 10, 11, and 12 are complained of. They read as follows:

(10) You are further instructed in reference to the question of damages, in case you find for the plaintiff and award her damages, then, in fixing the amount thereof, you may take into consideration the mental suffering, if

any, produced as the proximate result of the defendant's wrong complained of, if any. If, however, you find that such mental suffering was occasioned when and after she claims to have learned that defendant made the alleged slanderous statements complained of, and you find from the evidence that the defendant is not guilty of making the statements complained of in the petition, then you are instructed that under such circumstances the defendant would not be chargeable with such alleged mental suffering; nor would he be liable for any damages, if you so find that he is not guilty.

10. SAME:  
damages:  
instructions.

(11) If the jury believe from the evidence that the defendant is guilty of uttering the slanderous words charged in the petition, then they may take into consideration the pecuniary circumstances of the defendant and his position and influence in society, so far as these matters have been shown by the evidence, in estimating the amount of damages which the plaintiff ought to recover, if any. But in this connection you are instructed that it is proper for you to take into consideration the question as to whether or not it is necessarily true that a man possessed of property has, from that fact alone, the confidence and respect of the community in which he lives.

11. SAME.

No. 12 reads as follows:

The defendant is liable, if at all, only for the injury to plaintiff, if any, occasioned by and as the proximate result of his own wrongful acts, if any, in the matters complained of. The fact, if you so find, that other persons than defendant made slanderous statements of and concerning plaintiff, similar to those alleged to have been made by defendant, this would not relieve defendant from the alleged slander published by him, if any, or for the natural consequences thereof. On the other hand, if persons other than defendant published of and concerning plaintiff similar slanderous statements, independently of defendant and not emanating from him, or by his said statements, if any, then defendant would not be liable therefor; and this is so as to such slanders, if any, and rumors thereof, if any, before or after the alleged slanderous statements made by defendant, if he did make them.



In this connection defendant's counsel asked the following instruction:

You are instructed that the defendant is liable, if at all, only for the damages plaintiff suffered, if any, by reason of the statements, if any, made by the defendant to witnesses Tobin and Herring, and he is not liable for damages, if any, resulting to the plaintiff by reason of a repetition of such statements, if any, by said witnesses Tobin and Herring, or any other person.

This was refused, and the only instructions which relate to the subject are those already quoted. These are said to be erroneous, because they do not sufficiently narrow defendant's responsibility for the damages suffered to the slander uttered by him, and these words, taken from the twelfth, are made a special target: "On the other hand, if persons other than defendant published of and concerning plaintiff similar slanderous statements, independently of defendant and not emanating from him, or by his said statements, if any, then defendant would not be liable therefor; and this is so as to such slanders, if any, and rumors thereof, if any, before or after the alleged slanderous statements made by defendant, if he did make them." The fair and, indeed, the only inference which a jury could draw from this instruction is that defendant would be liable for slanderous statements made by other persons, if such statements emanated from defendant or grew out of slanderous statements made by him. In other words, if a stranger heard defendant's slanderous statements and repeated them, or if, hearing of such statements made by defendant, he repeated them to others, defendant would be liable for such repetitions. That such was the thought of the trial court appears not only from the instruction given, but is further evidenced by its refusal to give the instruction asked. While there are a few cases supporting the rule of the instruction, the great preponderance of authority is the other way. And the reason for the doctrine, sus-



tained by the weight of authority, is that no one, as a general rule, has the right to repeat a slanderous statement heard by him, even if he gives the source of his authority. For such repetition the party making it is liable; and, if the party who starts it is also liable, there would be a double liability. An exception to the general doctrine exists where the original slander is made to one with the expectation that it be repeated, or under such circumstances that the hearer would be expected to repeat it in the course of duty; but the instant case does not fall within any of the exceptions known to the law. Whatever the rule in other jurisdictions, we are committed to doctrine sustained by the weight of authority. Thus, in *Prime v. Eastwood*, 45 Iowa, 640, we said:

Against the objection of defendant, the court permitted the plaintiff to prove that there was a rumor in the neighborhood in reference to plaintiff, and that defendant had claimed that plaintiff had some of his hogs, the court instructed the jury as follows: 'In determining the amount of damages to be given to the plaintiff, if he is entitled to recover, you may consider the extent of the publication, as how far known and how understood and believed in the community where known, so as to determine the extent of the injury to his reputation.' The words charged were spoken on different occasions to Porter, to Tilden, and to McCarthy; no one else being present. 'Every speaker is the publisher of what he speaks, and is solely liable therefor. That the words spoken have been previously published by another can neither relieve the subsequent speaker from his liability for the publication made by him, nor impose any liability on the previous publisher.' Townshend on Slander, sections 114, 202. See, also, *Terwilliger v. Wands*, 17 N. Y. 54, 58 (72 Am. Dec. 420); *Ward v. Weeks*, 7 Bing. 211; *Stevens v. Hartwell*, 11 Metc. (Mass.) 542. The true rule upon the subject, we think, is that recognized in *Terwilliger v. Wands*, *supra*, that, where there is no proof of the circumstances under which slanderous words are repeated by the parties who originally heard them, the general rule that a repetition

of slanderous words is wrongful applies, and damages which result from repeating them are a consequence of that wrong, and not a natural, immediate, and legal effect of the original speaking by the defendant. The effect of the action of the court in receiving this evidence and in giving the above instruction was to hold the defendant liable for the extent to which the publication was known, and consequently for the repetition of the publication by others, without reference to the circumstances under which the repetition was made. In this there was error.

Again, in *Zurawski v. Reichmann*, 116 Iowa, 388, we said:

The court received evidence that persons other than those in whose presence the words were spoken had heard of them and of the charge made; and this without any evidence tending to show a repetition of the language by the defendant, or the circumstances under which it was repeated. This was prejudicial error under the holding in *Prime v. Eastwood*, 45 Iowa, 643. The only purpose of this evidence was to increase the plaintiff's damages, and, if held competent, would mulct the defendant for the wrong of another. *Odgers, Libel and Slander*, 151.

These cases were followed in *Morse v. Printing Co.*, 124 Iowa, 707; *Bank v. Fritz*, 135 Iowa, 47; *Schaffhauser v. Hemmer*, 152 Iowa, 205. The leading authority on this subject outside this state is *Burt v. Advertiser Co.*, 154 Mass. 238 (28 N. E. 1; 13 L. R. A. 97), to which reference is made. See, also, *Terwilliger v. Wands*, 17 N. Y. 57 (72 Am. Dec. 420). This general doctrine has been criticised on the theory, we suppose, that where one starts a slander he may reasonably expect that it will be repeated, and for such repetition reasonably to be anticipated he is liable. See *Sutherland on Damages* (2d Ed.) section 1222. But we are so firmly committed to the general rule that it is now too late to change it. Indeed, were we to do so at this time, it would result in a reversal of the case because of the court's failure to admit the testimony of Maud Carr,

Laura Godlove, and others. The reason for this being that, if defendant is to be held for repetitions of the slanderous statements, he should be allowed to show that others, without knowing of his statements, uttered the slander concerning the plaintiff, both before and after defendant had spoken the words charged. In other words, he should have been permitted to show that he was not responsible for the reports or for the entire damage; that others were equally guilty with him. The trial court was in error in giving the twelfth instruction, and this error was not cured by any other paragraph of the charge.

There is no doubt in our minds of the thought of the trial court in the giving of this twelfth instruction; but if in error here it is manifest that the matter was left in such a situation that a jury might fairly construe the charge as we have suggested, and, such being the record, the court should not have left the matter open to such a construction, but should have given the instruction asked by the defendant, or one covering the point in such a manner that defendant's responsibility might be clearly understood. The testimony as to humiliation, social ostracism, and other damages to plaintiff was such as to call for just such an instruction as the defendant requested.

Instruction eleven seems to be correct. *Bailey v. Bailey*, 94 Iowa, 606; *Herzman v. Oberfelder*, 54 Iowa, 85; *Karney v. Paisley*, 13 Iowa, 92.

For the error in giving the twelfth instruction and in refusing defendant's request, the judgment must be, and it is,—*Reversed*.

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L. M. BACON, Administrator, Appellee, v. IOWA CENTRAL RAILWAY COMPANY, Appellant.

**Removal of causes:** AMOUNT IN CONTROVERSY: HOW DETERMINED. The amount involved in an action for damages, for the purpose of removal from the state to a federal court, is governed by the

amount for which judgment is prayed, rather than by an allegation in the petition that plaintiff's damage was a larger sum.

**Same:** JURISDICTION OF FEDERAL COURT: DISMISSAL OF ACTION: EFFECT.

2 Where the amount in controversy is less than \$2,000, as appears from the pleadings, the cause is not removable from the state to the federal court. And where the defendant filed with the clerk a petition and bond for removal, based on the amount in controversy, which appeared from the pleadings to be less than \$2,000, and without directing the attention of the court thereto caused the transcript to be filed in the federal court, and that court merely continued the case and finally dismissed it, without determining its jurisdiction or passing upon the merits, the dismissal was not a bar to further prosecution in the state court.

**Same.** The mere filing of a petition and bond for the removal of  
3 a cause to the federal court does not deprive the state court of jurisdiction, unless the record shows on its face that the petitioner can remove the cause as a matter right under the statute; and where this does not appear from the entire record, it is not only the right of the state court, but its duty, to proceed and determine the issues in the ordinary course of litigation.

**Negligence:** PLEADINGS: LIMITATIONS. Although the petition in an  
4 action for negligence failed to allege freedom from contributory negligence until the filing of an amendment more than two years later, still the action was not for that reason barred.

**Same:** LAST CLEAR CHANCE. Under the evidence in this action the  
5 questions of whether the enginemen discovered decedent's peril, as he was about to pass over a crossing, and whether by the exercise of reasonable care they might have stopped the train and avoided the accident, were for the jury.

*Appeal from Mahaska District Court.*—HON. JOHN F. TALBOTT, Judge.

TUESDAY, OCTOBER 22, 1912.

ACTION for damages resulted in judgment against the defendant, from which it appeals.—*Affirmed.*

George W. Seevers and W. H. Bremner, and John O. Malcolm, for appellant.

*John McCoy, L. T. Shangle, J. B. Bolton, and D. C. Waggoner, for appellee.*

LADD, J.—This action was begun September 20, 1905, by the service of an original notice, in which the claim was said to be \$10,000. In the petition, filed two days later, plaintiff alleged that "the defendant's employees negligently and carelessly permitted the said Martin W. Lockhart to be killed, to the plaintiff's damage in the sum of \$10,000," but demanded judgment for \$1,990 only. The defendant filed an answer on September 30, 1905, admitting its corporate existence, and that the plaintiff's intestate was blind, and denying all other allegations of the petition. It filed a petition for removal to the Circuit Court of the United States, February 2d following, therein averring diverse citizenship, and that the amount in controversy, exclusive of all interest and costs, exceeded \$2,000, and also a bond approved by the clerk of the district court of Mahaska county. This petition was not presented to the district court, nor, so far as appears, was its attention directed thereto prior to October 6, 1910. Notwithstanding this, the clerk of the district court made out and certified a transcript of the papers on file and proceedings, which was filed in the Circuit Court of the United States, March 29, 1906. The record does not indicate that plaintiff ever appeared in that court, but several orders continuing the cause were entered of record, and on December 5, 1908, an order "that unless same be noticed for trial at the next term of this court, or good reason shown for not so doing, the same shall be dismissed for want of prosecution." At the May, 1909, term of that court, the cause was so dismissed at plaintiff's costs. In the meantime the case had not been placed on the printed docket of the district court of Mahaska county, but after the dismissal in the federal court, and on September 19, 1910, an amended and substituted petition was filed, in which the judgment prayed

was the same as in the original petition, and on October 6th following the petition for removal was overruled. Nine days later the defendant filed an answer thereto, denying the allegations of the amended and substituted petition, and pleading contributory negligence and the statute of limitations. Later a second amended and substituted petition, with prayer as before stated, was filed, and defendant moved that the cause of action be dismissed, and the two petitions last filed by plaintiff stricken from the files, on the ground that said cause had been transferred to the federal court, and there dismissed. This motion was overruled, and trial thereafter was had on the merits.

I. The point first made is that the amount in controversy exceeded \$2,000, and for this reason the court erred in overruling the petition for removal to the federal

1. REMOVAL OF  
CAUSES:  
amount in con-  
troversy: how  
determined.

court. While conceding that the prayer was for a judgment of less than \$2,000, it is argued that, inasmuch as the petition alleged the damages to be \$10,000, it, rather than the prayer, should control, relying on section 3775 of the Code, which declares that "the relief granted to plaintiff if there be no answer, can not exceed that which he has demanded in his petition; in any other case the court may grant him any relief consistent with the case made by the petition and embraced within the issues." It may be conceded that there are authorities which seem to hold that, under like statute, the prayer for relief becomes wholly immaterial after an answer has been filed. See *Marquat v. Marquat*, 12 N. Y. 336; 1 Bates' Pleading, etc., 315. An examination of these cases, however, discloses that the reasoning in each is broader than the decision. Thus in *Marquat v. Marquat* the action was for the specific performance of an agreement to execute a mortgage to secure a note, and for other relief. The defendants answered, denying any agreement to execute a mortgage, but alleging that the plaintiff merely loaned them money.

The court denied specific performance, but entered judgment for the amount due on the note. Other decisions are to the effect that the prayer for relief forms no part of the petition, and hence that its sufficiency and character must be determined from the facts stated rather than from the prayer for relief. *Henry v. McKittrick*, 42 Kan. 485 (22 Pac. 576); *Tiffin Glass Co. v. Stoeher*, 54 Ohio St. 157 (43 N. E. 279). In actions like this, the damages are unliquidated, and a prayer for judgment in a sum less than the damages alleged is equivalent to a remittance or waiver of the difference. Dillon in his work on Removal of Causes, section 93, says: "The value of the matter in dispute, for the purpose of removal, is to be determined by reference to the amount claimed in the declaration, petition, or bill of complaint." Of course this will not control when the allegations of the petition disclose the amount in controversy to be less than that for which judgment is prayed. 1 Ency. Pl. & Pr. 712; *Gorman v. Havird*, 141 U. S. 206 (11 Sup. Ct. 943, 35 L. Ed. 717). And the sum for which judgment is prayed is determinative of the amount in controversy with reference to the right of appeal. *Hiatt v. Nelson*, 100 Iowa, 750; *Nash v. Beckman*, 86 Iowa, 249; *Cooper v. Dillon*, 56 Iowa, 367. "In all actions sounding in damages the plaintiff is limited to his demand therefor in his declaration or complaint, and can recover no more than the amount specified." 5 Ency. Pl. & Pr. 712.

Our statute requires the petition to contain "a demand of the relief to which the plaintiff considers himself entitled, and if for money, the amount thereof;" and the rule prevails in this state under the statute first quoted that the court may not grant relief other than that prayed, unless included herein, or enter judgment or decree different from, unless equivalent to, that demanded. *Bottorff v. Lewis*, 121 Iowa, 27; *Browne v. Kiel*, 117 Iowa, 316; *Rees v. Shepherdson*, 95 Iowa, 431; *Marder v. Wright*, 70 Iowa, 42; *Tice v. Derby*, 59 Iowa, 312; *Lafever v.*

*Stone*, 55 Iowa, 49; *O'Connell v. Cotter*, 44 Iowa, 48. See, also, *Winney v. Sandwich Mfg. Co.*, 86 Iowa, 608; *Johnson v. Rider*, 84 Iowa, 50; *Humphreys v. Daggs*, 1 G. Greene, 435. Following these decisions, we necessarily reach the conclusion that the amount in controversy was less than \$2,000, the amount for which judgment was prayed, notwithstanding the allegation in the petition that the plaintiff had been damaged more than that sum. As precisely in point, see *Stark v. Port Blakely Milling Co.*, 44 Wash. 309 (87 Pac. 339); *Smith v. Railway Co.*, 3 N. D. 17 (53 N. W. 173); *Lake Erie & W. Ry. Co. v. Juday*, 19 Ind. App. 436 (49 N. E. 843).

II. The amount in controversy then affirmatively appeared from the pleadings on file to be less than \$2,000, though the petition for removal asserted it to exceed that sum, and under the act of Congress approved March 3, 1875, as amended by the acts of Congress approved March 3, 1887, and August 13, 1888, the cause was not removable. Section 3 of the act referred to provides:

That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from the state court to the Circuit Court of the United States, he may make and file a petition in such suit in such state court . . . for a removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond with good and sufficient surety. . . . It shall then be the duty of the said court to accept such petition and bond and proceed no further in such suit; and the said copy being entered as aforesaid in said Circuit Court of the United States, the case shall then proceed in the same manner as if it had been originally commenced in said circuit court.

The defendant filed a petition for removal, accompanied by a bond with the clerk of the district court, but

2. SAME: jurisdiction of federal court: dismissal of action: effect.



does not appear to have directed the court's attention thereto, nor to have afforded it an opportunity to "accept" the petition. It caused transcript of the record to be filed in the federal court, which, however, never ruled on the question of whether it acquired jurisdiction. It merely entered orders continuing the case, and finally dismissed the same without ruling thereon, or on the merits. Continuance orders were not inconsistent with want of jurisdiction, for this simply postponed action of any kind touching the disposition of the case. Nor was the dismissal a bar to the prosecution of another action. *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349 (14 Sup. Ct. 140, 37 L. Ed. 1107). It is not important, then, to consider the effect to be given to a judgment on its merits rendered in a federal court in a case not removable thereto; but see *Des Moines Navigation Co. v. Homestead*, 123 U. S. 552, 559 (8 Sup. Ct. 217, 31 L. Ed. 202), and *Chesapeake & O. Ry. Co. v. McCabe*, 213 U. S. 207 (29 Sup. Ct. 430, 53 L. Ed. 765), holding that such a judgment, if unreversed, will support a plea in bar. There was no adjudication of the right of removal by the United States Circuit Court, and, unless the cause was removable, the district court of Mahaska county was not required to yield jurisdiction upon the filing of the petition for removal.

Of course, the record as made by the filing of such petition can not be questioned in the state court, but if, as thus made, it appears upon its face that the cause was not removable, it was not only the privilege, but  
3. SAME. the duty, of the state court to retain jurisdiction, and to adjudicate the issues raised by the pleadings. In other words, the petition for removal, with the record as it appeared upon the filing thereof, presented a pure question of law as to whether removal had thereby been effected. In *Burlington, Cedar Rapids & Northern R. Co. v. Dunn*, 122 U. S. 513 (7 Sup. Ct. 1262, 30 L. Ed. 1159), Chief Justice White, speaking for the court,

observed that "the theory on which it rests is that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents, then, to the state court a pure question of law, and that is whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit. That question the state court has the right to decide for itself; and if it errs in keeping the case, and the highest court of the state affirms its decision, this court has jurisdiction to correct the error, considering for that purpose only the part of the record which ends with the petition for removal." That court has repeatedly recognized the principle above stated; i. e., that the state court is not required to let go its jurisdiction until a case is made which upon its face shows that the petitioner can remove the cause as a matter of right. *Pennsylvania Co. v. Bender*, 148 U. S. 255 (13 Sup. Ct. 591, 37 L. Ed. 441); *Meyer v. Delaware R. Const. Co.*, 100 U. S. 457, 474 (25 L. Ed. 593, 599); *Powers v. Chesapeake & O. R. Co.*, 169 U. S. 92 (18 Sup. Ct. 264, 42 L. Ed. 673); *Stone v. South Carolina*, 117 U. S. 430 (6 Sup. Ct. 799 (29 L. Ed. 962); *Yulee v. Vose*, 99 U. S. 545 (25 L. Ed. 356). See *Nat. Docks & N. J. Junct. Connect. Ry. Co. v. Pa. R. Co.*, 52 N. J. Eq. 58 (28 Atl. 71). The rule is well stated in *Gregory v. Hartley*, 113 U. S. 745 (5 Sup. Ct. 745, 28 L. Ed. 1150): "The district court was not bound to surrender its jurisdiction until a case was made, which on the face of the record showed that the petitioners were in law entitled to a removal. The mere filing of a petition was not enough, unless, when taken with the rest of the record, it showed on its face that the petitioners had under the statute a right to take the case to another tribunal."

So that, notwithstanding the assertion in the petition

r removal that the amount in controversy exceeded ,000, this was clearly shown by the record to be incorrect and the district court was not deprived of jurisdiction by e attempt to take the case to the federal court. Though e case had not been placed on the printed docket after e filing of the transcript in the federal court until the try of dismissal there, it had not been dismissed in the ate court. Nor does its omission from the docket appear have been in pursuance of any order of the latter tri- nal. It was still pending, notwithstanding the omission the clerk, and upon the filing of the amended and sub- tuted petition the court overruled the petition for re- oval. This asserted its jurisdiction at a time when first esented for its acceptance, and of which nothing had been ne to deprive it. Manifestly the court retained jurisdic- on of the cause, and there was no error in proceeding to termine the issues in the ordinary course of litigation.

The petition as first filed did not allege freedom from ntributory negligence. It was amended in this respect ore than two years afterwards, and appellant contends that the plea of the statute of limitations should have been sustained. *Cahill v. Rail- way*, 137 Iowa, 577, decides otherwise, and e question is so fully discussed there that nothing need added.

IV. The issue of whether decedent was guilty of con- ibutory negligence was withdrawn from the jury, and pellant contends that the evidence was not such as to justify the submission of the cause under the doctrine of the last fair chance. It appears at decedent stood near the crossing when the switch en- ne moved over the street to the south, where it coupled to a car and immediately backed over the crossing, run- ng decedent down. The engineer and fireman testify that ch had his head out of the cab looking north as the engine cked with the tender ahead. Other evidence located dece-

NEGLIGENCE:  
pleadings:  
limitations.

SAME: last  
clear chance.

dent, whose vision was impaired, where the fireman, at least, if he looked as he testified, must have seen him feeling his way across the track with his cane in time to have avoided the collision. Added to this, the jury might have found that in backing no signal was sounded. Whether the fireman so saw decedent, notwithstanding his denial, was an issue for the jury. *Purcell v. Railway*, 117 Iowa, 667; *Farrell v. Railway*, 123 Iowa, 690; *Gregory v. Railway*, 126 Iowa, 230. And, if he saw him, the jury might well have concluded that he should have appreciated the peril of his situation in time to have avoided a collision.

Discovering no error in the record, the judgment is —*Affirmed.*

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LILLIAN H. BURCH, Appellant, v. MARY M. NICHOLSON  
ET AL., Appellants, and JOSHUA MURPHY, Defending  
by Guardian, Appellee.

**Conveyances: DELIVERY: PRESUMPTION: ACCEPTANCE: BURDEN OF PROOF.**

- 1 A duly executed and recorded deed is presumed to have been delivered, and this presumption can not be overcome except by clear and satisfactory evidence. The mere fact that the grantee was of unsound mind at the time of recording will not of itself negative delivery. And where the instrument recites a paid consideration, and imposes no duty or obligation on the grantee, it is presumptively beneficial to him, and proof of acceptance is unnecessary.

**Same: DECLARATIONS OF FORMER OWNER: ADMISSIBILITY.**

- 2 Where an adult son, to whom his mother had conveyed her farm, lived with her on the land and cultivated it, her declaration that she regarded the son, who had been confined in the hospital for the insane, as capable of accepting the deed and that she advised him of its execution, were admissible against her heirs when attacking the validity of the deed; but such declarations, so far as tending to negative the intent to be presumed from recording the deed, were incompetent; the son being insane at the time of suit.

**Same: PRESENT TITLE: VALIDITY: EVIDENCE.**

- 3 The title to property conveyed can not be defeated by failure to pay a remaining por-

tion of the consideration. Nor are the declarations of a deceased grantor admissible for the purpose of attaching a parol condition to a deed, thus destroying its validity.

**Same.** The presumption of delivery arising from the recording of  
4 a deed can not be overcome by evidence that the grantor was advised against its delivery until the price was paid; or by subsequent declarations to the grantee that he was not to have the deed until he had performed certain conditions.

**Same:** INSANE GRANTOR: GOOD FAITH PURCHASER: NOTICE. Where  
5 a previous grantor had not been adjudged insane, an executed conveyance by him for value will not be set aside, as against a subsequent good faith purchaser without notice, where the subsequent purchaser can not be put in *statu quo*.

**Same:** SALE OF MINOR'S INTEREST: VALIDITY: LIMITATIONS. Where  
6 the guardianship proceedings for the sale of a minor's interest in land were admitted to be regular and that proper notice was given, the minor can not question the regularity after the expiration of the statutory period limiting a right of action in such cases.

**Same:** TRUSTS: EVIDENCE. The heirs to the estate of their deceased  
7 father, who conveyed their interests to their mother, since deceased, for the purpose of facilitating a settlement of the estate, are incompetent witnesses for the purpose of establishing a trust in the mother, pursuant to an alleged agreement on her part to pay the debts of the estate and hold the balance for their benefit; and such a trust can only be established by clear and satisfactory evidence. Inadequacy of consideration for the conveyances is not ground for setting them aside or declaring a trust.

**Same.** An express trust in land can not be established by parol  
8 proof; it must be in writing duly signed and acknowledged in conformity with the statute.

**Fraudulent conveyances:** CONFIDENTIAL RELATIONS. To set aside  
9 conveyances from children to their parent on the ground of fraud, it must appear that the grantors were led by fraudulent practices into parting with their title; as the relationship alone is not sufficient to render the conveyances presumptively fraudulent.

**Same:** LIMITATIONS. To set aside a conveyance on the ground of  
10 fraud the action must be brought within five years after discovery of the fraud; and the recording of a conveyance in violation of an alleged agreement to hold the property in trust is such notice to the claimed beneficiaries as will set the statute in motion. And the fact that the beneficiaries may have thought

that, in view of the relationship of the parties, they would ultimately receive the property, would not excuse a failure to institute the action within the statutory period.

Evans and Sherwin, JJ., dissenting.

*Appeal from Calhoun District Court.*—HON. F. M. POWERS, Judge.

THURSDAY, OCTOBER 24, 1912.

ACTION to quiet title in plaintiff to an undivided interest as tenant in common in a quarter section of land, title to which was at one time in Allen Murphy, plaintiff's grandfather, of whose estate plaintiff claims that she is joint heir with the defendants, and asking partition. By cross-petition all the defendants save Joshua Murphy ask the same relief as to their joint undivided interests as heirs of Allen Murphy. The guardian of Joshua Murphy, insane, asks that the title of the property be quieted in him exclusively as against the plaintiff and his codefendants. There was a decree in favor of Joshua Murphy in accordance with the prayer in his answer and cross-petition, from which decree plaintiff and all the other defendants appeal. —*Affirmed.*

*J. B. McCrary and John W. Jacobs, for appellants.*

*J. F. Lavender, for appellee.*

MCCLAIN, C. J.—In 1886 Allen Murphy died intestate, seised of the land in controversy, and leaving surviving him his widow, Deby Ann Murphy, six living children, and two grandchildren, the daughters of a deceased daughter; the grandchildren being at that time minors. One of the granddaughters, subsequently married, is the plaintiff in this action, and all the other heirs are defendants. Later in the same year all the children except Joshua

joined in a deed to their mother, Deby Ann Murphy, quitclaiming their interests to her in consideration of the sum of \$1 to each in hand paid. A guardian having been appointed for the two grandchildren, their interests were by proceedings regular in form transferred to their grandmother for a purported consideration of \$200. At the time these conveyances of their interests by the other heirs to the surviving widow were made, Joshua was in the insane hospital. In January, 1887, he returned from the hospital, and executed a quitclaim deed to his mother, but remained at home, and worked upon the farm for some years. In 1893 Joshua was again committed to the insane hospital, and since that time he is conceded to have been incurably insane. In the meantime a warranty deed from Deby Ann Murphy to Joshua, purporting to be executed on January 7, 1891, was filed for record and duly recorded as of February 9, 1891. The controversy in this case is as to whether this deed was delivered to Joshua and vested in him sole title to the property.

I. The recording of the deed duly executed by Deby Ann Murphy constituted presumptive, but not conclusive, evidence of delivery to Joshua, the grantee named therein.

1. CONVEYANCES:  
delivery: pre-  
sumption: ac-  
ceptance: bur-  
den of proof.

The burden of showing that the deed was not in fact delivered is upon appellants, and they can overcome the presumption of delivery only by clear and satisfactory evidence. As the deed recites a consideration in hand paid and apparently imposes no condition or obligation upon the grantee, it is presumed to have been beneficial to the grantee, and proof of his acceptance is unnecessary. *Robinson v. Gould*, 26 Iowa, 89. Therefore evidence that at the time the deed was recorded the grantee was of unsound mind and incapable of assuming obligations does not in itself tend to negative the delivery of the deed. *Cecil v. Beaver*, 28 Iowa, 241; *Newton v. Bealer*, 41 Iowa, 334; *Palmer v. Palmer*, 62 Iowa, 204; *Foreman v. Archer*, 130

Iowa, 49. It may be conceded that the deed do port to be a deed of gift, but the case of *Robinson supra*, is direct authority for the proposition that ing of a warranty deed apparently not a deed of gift, the grantee being an adult and not so related to the grantor as that a gift would perhaps be implied, is presumptive evidence of delivery, and, no obligation on the grantee being imposed, is presumed to be beneficial so that an acceptance will be implied. There is no evidence that the grantee had knowledge of the recording or assented to the passing of the title, and in that case the court refused to consider the retention of the grantor that he retained possession of the land as the intent of retaining title as sufficient evidence to negative the delivery presumed from the recording. The result of the rule announced in that case as applied to circumstances quite similar to those of the present case, the court used this language:

The burden of proof, therefore, is on the grantor (the grantor) to establish the nondelivery of the deed, or, to negative the presumed knowledge of the deed by the part of Anthony (the grantee) and his presumption of delivery. And as he seeks to divest an apparent title conveyed by a deed which had been on record many years before this suit was brought, and failed to do so until the grantee's lips have been closed by death, the burden is incumbent on him to make out a case plain, clear, and decisive. Admitting, as we do, that the plaintiff's evidence that his brother Anthony, though all the time living in the neighborhood, both of the plaintiff and the land, in fact had any notice of the deed, and hence assented to it, finds very much support in the evidence (and this is the distinct ground on which we base our decision) there is not the fullness and satisfactory of proof which courts ought to require to divest title against heirs (of the grantee) presumptively conveyed by a recorded deed of such long standing as the one in question in this case.



The facts in the case before us are even more persuasive than those in the case last referred to. At the time of the recording of the deed Joshua was in fact living with his mother on the land and farming it, and was, in so far as the evidence discloses, competent to accept a conveyance.

There is testimony as to declarations of the mother, which are certainly admissible as against the parties to this case claiming as her heirs, that she treated Joshua as capable of accepting the deed and advised him of its execution. Her declared purpose was to encourage him in the belief that he was the owner. Now Joshua's lips are closed, not it is true by death, but quite as effectually, by incurable insanity, which was pronounced two years after the recording of the deed. The lips of the grantor have been closed by death, as to her intentions we have no evidence save that deduced by her declarations made after the execution of the deed and testified to by the other heirs. So far as these declarations tend to negative the intent presumed from the recording of the deed, we think they are not competent to reach Joshua's title; but, if they were to be treated as competent, they go no further than to indicate a desire on part of his mother to impress him with the thought that he had assumed responsibilities which he must discharge in order to realize the benefits of the transaction.

as: declara-  
tion of form-  
owner:  
admissibility.

able of accepting the deed and advised him of its execution. Her declared purpose was to encourage him in the belief that he was the owner.

Now Joshua's lips are closed, not it is true by death, but quite as effectually, by incurable insanity, which was pronounced two years after the recording of the deed.

The lips of the grantor have been closed by death, as to her intentions we have no evidence save that deduced by her declarations made after the execution of the deed and testified to by the other heirs.

So far as these declarations tend to negative the intent presumed from the recording of the deed, we think they are not competent to reach Joshua's title; but, if they were to be treated as competent, they go no further than to indicate a desire on part of his mother to impress him with the thought that he had assumed responsibilities which he must discharge in order to realize the benefits of the transaction.

It is plain that if the deed conferred a present title, which the law presumes, failure of Joshua to pay any portion of the consideration which remained unpaid would not defeat that title.

as: present  
title: validity:  
evidence.

In short, the appellants are seeking to defeat the legal effect of the deed by showing declarations of the deceased grantor attaching a parol condition. We are clear that such declarations may not be shown for that purpose.

Evidence for appellants that at the time the deed was executed by the mother she was advised to keep it, and not Joshua have it until he had settled with her and paid

her what he had agreed to give for the pr  
 4. SAME.                      persuasive as to the intentio  
    maintained in the mother's mind  
 was subsequently recorded. She may well h  
 to vest the title in Joshua by the recording of  
 as already indicated, her subsequent declarati  
 that he was not to have it until he performed  
 tions were not competent nor sufficient to over  
 sumption of delivery arising from the rec  
 instrument.

II. The sufficiency of the conveyances  
 other than Joshua to vest a complete title i  
 prior to her execution of the conveyance to J  
 tioned on various grounds.

It is contended that one of the sons,  
 presumed to be dead, was insane when he q  
 undivided interest in the property to his  
 5. SAME: insane                      there was no judicial determ  
      grantor: good                      his insanity until after the ex  
      faith purchas-                      quitclaim deed; and, while the  
      er: notice.                      to show that he was in fact insane prior to  
    that his mother had knowledge of his conditio  
 evidence affecting Joshua with such knowle  
 is therefore in the situation of claiming title  
 vided interest of his brother George through  
 executed at a time when George was presu  
 and it is well settled that an executed convey  
 to a good faith purchaser will not be set as  
 on the ground of insanity of which the pur  
 notice in case he can not be put in *statu quo*  
*De Armond*, 44 Iowa, 229; *Abbott v. Creal*,  
*Alexander v. Haskins*, 68 Iowa, 73; *Swartwo*  
 131 Iowa, 714.

As to the contention that the conveyance  
 grandchildren of their interest to their grand  
 conveyance was made by their guardian in

ceeding, was invalid, it is sufficient to say that the time for questioning the regularity of the proceedings had expired long before this action was brought. See Code, section 3212. It is admitted that the guardianship proceedings in pursuance of which the sale was made were regular in form, and that proper notice thereof was served. The minors who have long since attained their majority, and who have failed to question the regularity of the proceedings during the statutory period of limitation in such cases, can not now have relief on account of such irregularities, if any there may have been.

6. SAME: sale of  
minor's inter-  
est: validity:  
limitations.

Although the record is entirely free from any suggestion of actual fraud or undue influence on the part of Deby Ann Murphy in procuring by quitclaim deeds the apparent fee-simple title to the land in controversy in which she had only a dower interest after her husband's death, it is the contention of appellants that the quitclaim deeds were executed in pursuance of an arrangement or understanding in the nature of a family settlement by which she was to hold title to the property until her death, when it should descend to the heirs in accordance with law, and that her conveyance to Joshua was in violation of this arrangement and in that respect a constructive fraud. Appellants rely upon want of substantial consideration for the quitclaim deeds, and on proof of conversations between several of the heirs and their mother as to the purpose for which the title was being placed in her. But want of adequate consideration for the quitclaims would not be a ground for setting them aside or declaring a trust, and, as to the evidence relating to a mutual purpose or intention that the property be held in trust, it is sufficient to say that much of the testimony supporting such an arrangement related to conversations between the witnesses testifying, who are parties to this suit, and their mother, which is wholly incompetent under

7. SAME: trusts:  
evidence.

Code, section 3604, and that without regard to the testimony is far from being clear and satisfactory that any such arrangement was acquiesced in by the mother. The farm was mortgaged, and there was a debt of Allen Murphy to be paid. It seems to have been the general desire that his estate be settled without going into the probate court. To facilitate such settlement the children voluntarily made these conveyances, but there was no attempt in the record to establish a definite trust or undertaking on the part of the widow that the debts were paid the property should be held in trust. It is hardly necessary to say that in order to charge property with a trust the evidence must be clear and satisfactory. See *Palmer v. Palmer*, 62 Iowa, 204; *Luckhart v. Luckhart*, 120 Iowa, 248.

No constructive trust is made out, and parol evidence of an express trust is excluded by the provisions of sections 2918, 4625. *Gregory v. Bowsby*, 115

**B. SAME.** We do not hold, as counsel for the appellant seem to think we must if we affirm the judgment, that parol evidence is not admissible to establish a constructive trust, and we readily acquiesce in the proposition that a family arrangement, even in the absence of a deed, may be established to charge property with a trust in favor of a member of the family to whom it has been conveyed by other members.

But in the case before us there were no confidential relations between the adult children and their mother as to these quitclaim deeds and their mother as to

**9. FRAUDULENT CONVEYANCES: confidential relations.** conveyances presumptively fraudulent. To invalidate these conveyances, it must be made to appear that the grantors were induced by fraudulent practices or deception into parting with title to their respective shares. *Newis v. Topfer*, 433.

But, even if there were sufficient evidence tending to show a constructive trust by reason of the violation on the part of Deby Ann Murphy of an agreement in pursuance of which the quitclaims were executed, the right of action in favor of the appellants on that ground is effectually barred. An action brought for relief on the ground of fraud must be brought within five years after the discovery of such fraud by the party aggrieved. Code, section 3447, paragraph 6, and section 3448. When Deby Ann Murphy executed a warranty deed to the property to Joshua, she violated the terms of the trust which the appellants now seek to establish, and, when that deed was recorded in 1891, the appellants became charged with notice of the fact. *Bishop v. Knowles*, 53 Iowa, 268; *Laird v. Kilbourne*, 70 Iowa, 83; *McDonald v. Bayard Savings Bank*, 123 Iowa, 413.

Some of the appellants as witnesses testified to circumstances excusing them from sooner instituting action, such as that they supposed Joshua would not live long, and, as he was unmarried and childless, the title of the property would revert to them as his heirs. This explanation might have bearing if laches were relied upon as against the appellants, but it has no bearing on the running of the statute of limitations. As the appellants became aware by the recording of the deed to Joshua that their mother was disclaiming the trust now alleged, it was their duty within the statutory period to institute a proper action for relief.

In no view of the case can we see how any right to relief at law or in equity is made out in behalf of the appellants, or any of them, and the decree is—*Affirmed*.

EVANS, J. (dissenting).—The land involved consists of 160 acres in Calhoun county. Allen Murphy died seised thereof in February, 1886. He died intestate and left surviving him his widow, Deby Ann Murphy, and six children and two grandchildren, being the daughters of a de-

ased daughter. The children were George, Joshua, Henry, Richard, Mrs. Mary Nicholson, and Mrs. Allie Thompson. These were all adult at the time of the death of the father, and three of them were married. The grandchildren were William and Minnie Luughead; the former being the plaintiff herein. They were minors, and were living in the home of the deceased at the time of his death. George, Joshua, and Richard were unmarried, and continued as members of the family up to the time of the decease of the father. At the time of the decease of the father the land was incumbered, and the rest of the estate was small, and no administrator was ever had. In August, 1886, all the children except Joshua joined in a quitclaim deed of the land to the mother for a consideration of \$1. In guardianship proceedings, regular in form, the interest of the grandchildren was also conveyed to the mother for a purported consideration of \$200. At the time of the execution of the quitclaim deed by the adult heirs, Joshua was in the insane hospital, having been committed there April preceding. In January, 1887, he returned from the hospital, and in the same month he also executed a quitclaim deed to his mother. On August 30, 1886, George was committed to the insane hospital. Some months later he escaped therefrom, and has never since been heard from. After Joshua's return from the hospital in January, 1887, he remained at home and worked upon the farm for some years, although he never recovered his normal mental condition. In 1893 he was again committed to the hospital, where he has been ever since except for one brief interval. Ever since 1893 he has been deemed as incurably insane. On February 9, 1891, a deed of the land in controversy executed by Deby Ann Murphy to Joshua Murphy as grantee was filed for record and duly recorded. This deed purported to be executed on January 7, 1891. It is in virtue of this record that the record title of this land appears to be in Joshua Murphy.

The contention of the appellants is: (1) That the deed from Deby Ann Murphy to Joshua was never in fact delivered and that its recording was wholly unauthorized. (2) That the quitclaim deed executed to Mrs. Murphy by her children was so executed in consideration that she should thereby preserve the property, and permit the grantors to inherit their respective shares through her after her decease, and that Joshua had knowledge of such fact before 1891. (3) It is contended for the plaintiff that the guardianship proceedings were void, and that no title passed thereby from her to her grandmother. The net result of the pleadings is that the appellants are all agreed as to the relief demanded. They contend that each of the living children (excluding George, who is presumed to be dead) is the owner of the undivided one-sixth of the land, and that the two grandchildren are the owners of the remaining one-sixth thereof, and that Joshua's only interest in the land is such one-sixth share thereof. The answer of the defendant by his guardian is, in effect, a general denial with certain specific admissions. As to the alleged invalidity of the guardian's deed, he pleads the five-year statute of limitations as set forth in section 3332 of the Code of 1897. He contends for the validity of the title of his ward, and presents a cross-bill to quiet such title. I think the appellants are entitled to the relief prayed.

I. I will direct my principal attention to the question whether Joshua ever did, in fact, acquire from his mother the title to this land. This depends upon the question whether there ever was a delivery of the deed. The deed was never known to be in the possession of Joshua at any time. It was last known to be in the possession of the mother. But it was recorded. Such recording creates a presumption of delivery. *Luckhart v. Luckhart*, 120 Iowa, 250. The burden is therefore upon the appellants to prove the contrary, and this must be done by clear and satisfactory evidence. *Robinson v. Gould*, 26 Iowa, 89. The mere

recording of the deed does not of itself constitute a delivery. It is only evidence of delivery. *Day v. Griffith*, 15 Iowa, 104; *Cobb v. Chase*, 54 Iowa, 253; *Davis v. Davis*, 92 Iowa, 157. Instruments are frequently executed and recorded before delivery merely by way of anticipation and preparation for the final consummation of the transaction under contemplation. The question of delivery in a given case is usually one of intent on the part of the grantor. *Creveling v. Banta*, 138 Iowa, 52; *Erler v. Erler*, 124 Iowa, 726. Where a parent executes and records a deed of gift to an infant child, this has been held of itself a good delivery, though the custody of the deed remain in the grantor. *Cecil v. Beaver*, 28 Iowa, 246; *Palmer v. Palmer*, 62 Iowa, 204. This holding is in the nature of an exception to the general rule. It is put upon the ground that there is no other practicable way that a parent can make a gift of land to his infant child. And this is in harmony with the general rule that the intent of the grantor governs, and that the recording of the deed under such circumstances is intended as an act of delivery. It should be noted that in the case before us the deed was not from a parent to an infant child. Even if the same rule should apply to an imbecile as to an infant in such cases, as contended for by appellee, yet the mother, grantor, was not dealing with Joshua as with an infant. With abundant hopes, she was assuming to deal with him as one recovered from his mental aberration and competent to do business. I am clear, therefore, that the case comes under the general rule that the mere recording of the deed did not constitute delivery, but was presumptive evidence thereof.

This is not a case where a parent proposed to make a gift of advancement to a child. The transaction was one of proposed purchase and sale. The farm covered by the deed included all the property owned by the mother and her entire family. Joshua had worked upon the farm since



his return from the hospital. He was much changed in manner, and was apparently depressed in spirit. He wanted to buy the farm. His mother believed that the purchase would stimulate him, and would aid in the improvement of his condition. The negotiations were known to the other members of the family, and were in no sense secret. The mother went to the office of an attorney in company with another member of the family, and procured a deed to be prepared, which she executed in due form. She took it home and showed it to Joshua, and explained to him what she expected of him before the deed could be delivered to him. The deed called for a consideration of \$4,800. This was the full value of the property. This consideration was to be paid by the assumption or payment of certain debts owing by Mrs. Murphy and by furnishing a home as long as she should live to her and to the "two children" (grandchildren), and by paying her an additional sum of \$600. That the negotiations contemplated acceptance and performance by Joshua to the extent at least of executing some written undertaking on his part is a conclusion quite unavoidable from all the circumstances appearing in evidence. This was in January and February, 1891. It is shown clearly that nothing further was ever done regarding the consideration to be paid or assumed. Immediately thereafter Joshua's mental condition became worse, and the brother Henry came on about the 1st of March, and took charge of the farm for that season. The mother retained the possession of the deed, and kept the same in a little box, together with the quitclaim deeds which she had received from her children. She continued in possession of the farm up to the time of her death in December, 1894. Joshua was committed to the hospital for the second time in 1893 as already indicated. The deed executed by the mother was last seen in her box. After her death it could not be found. No witness knew by whom the deed was filed for record, nor any circumstances in relation thereto.

The deed was never seen in the possession of Joshua either in his lucid moments or at any other time, nor was it found among his effects by his guardian after his committal. The relations of the family were affectionate. There does not appear to have been any opposition to the proposed sale to Joshua, nor does there appear to have been any motive to secrecy. Inasmuch as it clearly appears that the proposed deed was not intended as a gift or advancement, and that it was executed only in pursuance of a proposed purchase and sale, and that these negotiations were never consummated in any other respect, it becomes difficult to believe that a delivery could have been intended. The substantial consideration called for implied the necessity of acceptance and performance in some manner on Joshua's part, and it implied some act or undertaking on his part as a condition precedent to the delivery of the deed and the passing of title. The failure on his part to perform any of the precedent conditions would therefore negative the theory of the delivery. *Creveling v. Banta, supra.*

It is a substantial circumstance in appellants' favor that further negotiations on the part of Joshua became impossible because of his failing mental condition. The proposed consideration therefore wholly failed. If there was an intent to deliver the deed, there must have been an intent also to deliver immediate possession of the farm. But it is clear that the mother never parted with the possession of the farm, but held it as her own to the end of her life. Taking the circumstances as a whole, therefore, they present a strong and meritorious case as against the theory of the delivery of the deed. In some respects these circumstances are more satisfactory than the direct evidence of partisan witnesses might have been. They are in their nature wholly indisputable and thoroughly inconsistent with any theory of a completed transaction. If the negotiations failed before their completion, then presump-

tively the rights of the parties remained in *statu quo*. If the mother had brought an action in 1893 based upon the state of facts appearing herein and had asked to remove the cloud from her title, she must have prevailed. It could not be held that she inadvertently parted with her title by the mere recording of the deed in view of the later failure of negotiations. If the mother could have prevailed, then, these appellants should prevail now, unless they have lost something by the long lapse of time. It is a circumstance against the appellant that the mother took no steps in her lifetime to remove the cloud from the record. On the other hand, it does not appear whether she actually knew of it except as the presumption may obtain. She did not live long thereafter, nor was her possession in any manner challenged. It is said in argument by appellee that the guardian has been in possession for many years since the death of the mother. The record, however, is silent on that question. Adverse possession is not claimed either by pleading or otherwise. Neither is there any claim of laches. No rights of innocent third parties are involved. The long period of time which has elapsed since this cloud was placed upon the record before it was challenged is an important circumstance against the appellants. It is in the nature of an acquiescence, and the judicial mind asks for no explanation. When Joshua was committed in 1893, it was the opinion of the physician that his life would be very brief. It was the belief of the appellants herein that, if he recovered from his insanity, he would voluntarily remove such cloud himself. On the other hand, if his death resulted, these same parties would inherit from him as his heirs all of his property. The situation was one which might well appeal to the parties for a delay in the institution of suit. In such delay they followed the advice of counsel as well as their own inclinations. The relations of the members of this family appear always to have been free from friction, and marked by much tender regard for

each other, including their unfortunate brother. To award them the relief prayed herein would not despoil him. His present expectancy of life is eighteen years. This property is now of the value of more than \$18,000. Joshua's right to a share thereof is recognized, and such share will amply meet all his requirements.

I reach the conclusion that there was no consummation of the proposed sale to Joshua, and that the title remained in the mother until her death, and that each of the parties herein is entitled to a child's share. I feel impelled, therefore, to dissent from the majority opinion.

SHERWIN, J.—I concur in the foregoing dissent.

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FRANK M. TOUT, Appellee, v. MARY E. WOODIN and  
Others, Appellants.

**Parent and child: ILLEGITIMATE RELATIONSHIP: EVIDENCE.** In this action to establish plaintiff's alleged rights as an illegitimate son and heir to decedent's estate, the evidence is reviewed and held to show that plaintiff was the son of decedent.

**Same: RECOGNITION: EVIDENCE.** The recognition by a putative father of his illegitimate child, to be such as to entitle the child to inherit, must be general and notorious; but it need not have been universal or made known to all, or to a majority of the community. It is sufficient if the father frankly admitted the relationship whenever there was occasion for him to speak, and made no effort to conceal the same, even though many of his friends and acquaintances had no knowledge of such recognition. Evidence held to show recognition.

**Same: PATERNITY: EVIDENCE.** Statements of the mother of an illegitimate child, made at the time of its birth and repeatedly thereafter, that decedent was the father of her child, were admissible as tending to show its paternity.

*Appeal from Keokuk District Court.*—HON. W. G.  
CLEMENTS, Judge.

FRIDAY, OCTOBER 25, 1912.

PLAINTIFF claims to be the illegitimate son of Evan H. Skillman, deceased, who in his lifetime recognized such relationship. Skillman died without will, and this action was begun to establish plaintiff's alleged rights as an heir of the estate. Decree as prayed, and defendants appeal. —*Affirmed.*

*Stockman & Baker, and J. A. Devitt, for appellants.*

*John O. Malcolm and Geo. C. True, and D. W. Hamilton, for appellee.*

WEAVER, J.—I. The law applicable to cases of this class is not the subject of serious dispute between counsel, but, concerning its effect as applied to the case at bar, there is quite naturally a wide divergence of opinion. The evidence on part of the plaintiff tends to show that Evan H. Skillman was born in the year 1850, and, except for a period (as hereinafter noted) when he was under restraint in a hospital for the insane, he lived quite continuously at Sigourney, Iowa. In the year '1894 he married one Emma Runyon, who died without issue. Skillman died without direct heirs, unless plaintiff is adjudged entitled to stand in that relation. The defendants are the collateral relatives of the deceased, who will inherit the estate if plaintiff's claim is rejected. That plaintiff is the son of one Laura Belle Myers, an unmarried woman, and was born in Sigourney in 1878, appears to be conceded. When about six months old, plaintiff was adopted by one Basil Tout, and was thereafter known by the name of the adopting parent. About the time of his adoption, Miss Myers is said to have married one Hall and removed from Sigourney, but whether such marriage took place is not certain. She is not now living. In support of the claim that Skillman was father of the child, the testimony of several witnesses was offered

1. PARENT AND  
CHILD: illegiti-  
mate relation-  
ship: evidence.

tending to show that Skillman visited and waited upon Miss Myers for a considerable period before her pregnant condition became known to her friends and neighbors. That she frequently charged Skillman with the paternity of the boy is also shown. If witnesses are to be believed, he spoke of plaintiff as his child or his boy to the mother of Miss Myers, to his associates, and to his acquaintances and friends McClenahan, Gears, McCoy, Grimes, Covey, Lyons, Webb, Lowe, Newkirk, Osborne, Benton, McConnell, Crowe, Bootin, Brown and Reiner. To others he said he had a child—or had a boy—over at What Cheer, the place where Tout resided, but did not always name or point him out. To other witnesses he said he would have married Belle (plaintiff's mother) if it had not been for his folks. It appears that, when the pregnant condition of Miss Myers became known, she went or was sent to the county poor farm, where she remained until she recovered from her confinement. Members of the family then in charge of the farm testify that, after plaintiff was born, Skillman visited the mother while she was still in bed, held the child in his arms, and brought or sent goods or supplies for its use. Another witness, a woman residing in Sigourney, testifies that after plaintiff had been adopted by Tout, and before his mother removed from Iowa, the latter, returning to Sigourney from a neighboring town, was met at the station by Skillman, who brought her to the witness' home, where, at his request, she was kept overnight. In speaking of her to the witness he called her "my girl." On the following morning he went away with her. Other circumstances are relied upon to corroborate or strengthen plaintiff's theory of the facts, but we think it unnecessary to pursue the recitation any farther. In defense, two of Skillman's sisters, defendants herein, deny that the deceased at any time in conversation with them or in their presence ever said or admitted that he was plaintiff's father. In further pursuance of the same line of testimony witnesses

Schipper, Funk, Kleinschmidt, Namur, Ford, Neas, Lewis, Dern, Pinkerton, Mackey, Kerr, Franken, Johnston, Linder, Jessup, Carr, Paff, Rice, and Goldthwait, business men, professional men, farmers, and others who knew Skillman in his lifetime, and had more or less intimate acquaintance with him, all testify that they never heard him admit the paternity of the child. But one witness, North, ever heard him deny that the child was his. It was also shown that in June, 1894, Skillman was adjudged a proper subject for treatment in the hospital for the insane, and was there confined a short time, when he returned home. In the following year he was recommitted to the hospital, where he remained substantially all the time until his death in 1908. He left an estate valued at from \$20,000 to \$25,000, subject to mortgage and other indebtedness not exceeding \$4,000.

This, stated as briefly as possible, is the record presented, and it is apparent that the central question upon which our decision must turn is one of fact. Is the evidence sufficient to establish the fact that the plaintiff is the son of Evan H. Skillman, deceased? If such paternity has been proven, we then have to inquire whether Skillman's alleged recognition of that relation is shown to be general and notorious within the meaning of the statute. Code, section 3385. That the trial court correctly found the alleged paternity satisfactorily proven we have little doubt. All the evidence given on the subject bears in that direction. The defendants offer no evidence to the contrary, but ask the court to infer, or rather to indulge in the suspicion, that because of the young woman's subsequent relations with Hall, he must have been the father of the child. This we can not do upon such slight foundation. The only debatable proposition that is vital to the case is upon the question of the sufficiency of the recognition.

II. As has already been said, it must have been general and notorious. But to fill this measure it is not re-

quired that the recognition should have been universal or made known to all or to a majority of the community. *Van Horn v. Van Horn*, 107 Iowa, 247; *Blair v. Howell*, 68 Iowa, 619.

2. SAME:  
recognition:  
evidence.

It can not be supposed that in any case a putative father, however sincere his purpose to recognize an illegitimate child, nor however frankly he may admit the relationship when there is occasion for him to speak of it at all, will make it the subject of voluntary rehearsal to every person whom he meets, or force the unpleasant subject into conversation with others. If in his intercourse with neighbors, associates, and friends he makes no attempt to conceal the relationship he bears to the child, but acknowledges it openly whenever any reference to the subject is made, and this recognition is so often repeated to different people as to evince his willingness that all who care to know the truth may understand that he admits himself the father of the child, we regard it as sufficiently general for the purposes of the statutory rule, although many of his acquaintances may never have heard him mention the matter. It appears quite clearly that at the time of the birth of plaintiff and for years thereafter Skillman was very generally reputed to be his father.

It is true, as counsel say, that such paternity can not be established by hearsay or rumor or current scandal. The circumstance of such general repute may, however, be of some significance, not as in itself proving the relationship, but as bearing upon the effect to be given the testimony of defendant's witnesses, who say they knew Skillman well, and never heard him mention the matter; for if such story was being publicly bandied about in the community where he lived, and he took no pains to deny it to the friends and acquaintances whose good opinion he would be likely to covet, does it not lend some weight to the affirmative testimony as to his acknowledgment of the child? See *Alston v. Alston*, 114 Iowa, 29. But, even



if we disregard the evidence of repute as being incompetent for any purpose, we must still say that the clear weight of the competent testimony is with the plaintiff. It may be admitted that the story told by one or two witnesses has a somewhat strained and unnatural sound, and, if the case rested upon this alone, we might perhaps reach a different conclusion. But no attempt has been made to impeach the credibility of the twenty or more persons who testify to Skillman's acknowledgment of the relationship. So far as appears, none of them had any interest in the controversy, and the court below, having them present at the trial and under its immediate observation, has accepted their testimony as true. Conceding their credibility, and we can not consistently do otherwise in view of the record before us, the decree entered below was inevitable. The acknowledgment was not a single or isolated admission. No two of the witnesses testify to the same admission. The statements of Skillman were not made in confidence, or as a secret to be concealed by the persons to whom they were made but openly and without apparent reserve, and they seem to have been made on so many and different occasions, and with a single instance of denial on his part, that we are forced to hold the recognition to be both general and notorious. Against this evidence defendants offer nothing whatever, except an array of witnesses who knew Skillman, and who say that he never made any such acknowledgment to them or in their hearing. Conceding that this evidence was competent, we think it must be said to be both weak and inconclusive.

Counsel have called our attention to census statistics showing Sigourney at the time in question to have been a town of from 1,300 to 2,000 inhabitants. The purpose of this reference, we assume, is to contrast the number of witnesses testifying for the plaintiff, as compared with the population of the town, and thereby draw the conclusion that the recognition was neither general nor notorious. The

argument is unsound. To make his case plaintiff was not bound, as we have already said, to show that the admissions had been made to every person in the community or to a majority of such persons. If Skillman made the acknowledgment openly and not in secret, and to so many different persons and upon so many different occasions that we may say he made it public property, and manifested a willingness that all who cared to know or inquire should understand that he recognized the paternity of the child, the showing of these facts is all that is required to sustain the decree appealed from.

Our attention has been called by counsel on both sides to the adjudicated cases, but we think it unnecessary to attempt their extended review. Cases of this character turn so largely upon varying states of fact that precedents directly in point are rare, while the essential rules of law applicable to such issues are the subject of little, if any, dispute. Our construction of the law and treatment of the facts finds more or less support in *Blair v. Howell*, 68 Iowa, 619; *Alston v. Alston*, 114 Iowa, 29; *Morgan v. Strand*, 133 Iowa, 299; *Van Horn v. Van Horn*, 107 Iowa, 247. Upon the question of general and notorious recognition, it is said in the Van Horn case that "general" is not equivalent to universal, but means rather "extensive, though not universal, and that 'notorious' is synonymous with 'open' and should be construed with reference to the circumstances and surroundings of the parties." Again, it has been said that, where the general bearing of the putative father toward the child "is such as to involve a recognition, it follows that the recognition was general." *Blair v. Howell, supra*; *Alston v. Alston, supra*. Upon the same subject we said in *Morgan v. Strand, supra*: "The record leaves little doubt of a general and notorious recognition that he did have a child back in Illinois. Doubtless he did not tell every one he talked with, but whenever the subject was broached he freely stated his connection with

such child." Measured by the standard approved in these cases, the plaintiff's recognition by Skillman was clearly established.

III. The court permitted plaintiff to prove that at the time of his birth and repeatedly thereafter his mother stated to witnesses that Skillman was the father of her child. Of this ruling complaint is made.

3. **SAME: paternity: evidence.** The same objection was made in the *Alston* case, but we held it not well taken, saying: "Declarations as to the paternity of a child made by the father and mother in their lifetime may be shown, and circumstances indicating a recognition of the relationship on their part." Other items of evidence are urged upon our attention by the appellants, but in each and every instance they have only a remote and uncertain bearing upon the case and none of them are necessarily inconsistent with the truth of the plaintiff's claim. The preponderance of the evidence is largely with the plaintiff upon every material issue in the case.

We find no reason to disturb the conclusion announced by the court below, and the decree appealed from is therefore—*Affirmed*.

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GILCREST & COMPANY ET AL., Appellees, v. CITY OF DES MOINES, Appellant, and BARBER ASPHALT PAVING COMPANY, Intervener, Appellant.

**Municipal corporations: PUBLIC IMPROVEMENT: RESOLUTION OF NECESSITY: PUBLICATION: WAIVER.** The publication of a resolution of necessity for a street improvement is jurisdictional; and failure to publish the same in conformity with the statute renders an assessment therefor invalid, unless property owners affected thereby have waived their right to rely on the objection.

**Same: WAIVER OF OBJECTIONS: ESTOPPEL.** Where the petitioners for a street improvement knew that the work was in progress and made no objection thereto, except as to the quality of the work, and in no manner questioned the validity of the procedure under

which it was being done, they were estopped from objecting to the jurisdiction of the city to make the improvement after the work was completed.

**Same: BOARD OF PUBLIC WORKS: ACCEPTANCE OF IMPROVEMENT.** The  
3 acceptance of a public improvement upon its completion by a board of public works, and the aproval of a schedule of assessments, could only be done by the board when in session and acting as a board; an approval by the members individually was not authorized by the statue. And where the board consisted of two members, one of whom acting alone approved a tentative schedule of assessment prepared by the engineer, and the other refused to assent thereto, the approval of the schedule by the engineer did not constitute a legal acceptance of the work, even though he had power to cast a deciding vote in case of disagreement of the members of the board.

**Same: ASSESSMENTS: OBJECTIONS: RIGHT OF PROPERTY OWNERS TO BE**  
4 **HEARD.** The owner of property to be assessed for a public improvement is entitled to make the objection before the city council, that the work has been performed in such defective manner that the property ought not to be subjected to the burden of paying for it. And even though the board of public works may have accepted the improvement and made a schedule of assessments, the question of assessment was still open for review by the council upon objection to the validity or correctness of the same, and a denial of the right of property owners to be heard on that question rendered the assessment invalid.

**Same: INVALID ASSESSMENT: LIABILITY OF CITY.** Where the owners  
5 of property are not liable for an assessment for a street improvement, because of some defect in the proceedings which is chargeable to the city, a contractor who has completed the improvement may recover the cost thereof from the city.

**Same: ESTOPPEL: PLEADINGS.** In proceedings before a city council  
6 and on appeal to enforce assessments for a public improvement, formal pleadings are not contemplated; and the city may show that property owners who petitioned for the improvement had so far acquiesced in its construction as to estop themselves from objection to the invalidity of the proceedings, without pleading a waiver or an estoppel.

*Appeal from Polk District Court.—HON. W. H. McHENRY, Judge.*

FRIDAY, OCTOBER 25, 1912.

THIS action and twenty others consolidated therewith are in the nature of appeals from special assessments levied by the city council of Des Moines for the expense of certain street paving. The particular nature of the controversy and the material facts are fully stated in the opinion.—*Modified and affirmed.*

*R. O. Brennan*, for City of Des Moines.

*Read & Read*, for Barber Asphalt Paving Co.

*Hager & Powell, Henry & Henry, Craig T. Wright,*  
and *Thomas F. Stevenson*, for appellees.

WEAVER, J.—A resolution looking to the pavement of the streets in question having been presented to the city council, a date was fixed for hearing objections to the proposed improvement. The proposition describes the pavement to be laid as "asphalt having one and one-half inch wearing surface and an inch binder course on six inches of cement concrete foundation," according to specifications to be furnished by the city engineer. Four property owners appeared and objected to the passage of the resolution; but it was adopted, and the order for the paving was entered of record as being "without the petition of the owners of a majority of the linear front feet of property abutting thereon." The prepared plans and specifications were approved by the board of public works and notice to bidders published describing the improvement substantially as in the original resolution. The Barber Asphalt Paving Company was declared the successful bidder, and contract with that company was duly drawn and executed providing that the work be done in thorough, substantial, and workmanlike manner and in strict compliance with the plans and specifications. The work being completed, the city engineer prepared a schedule of assessments and pre-

sented it to the board of public works. Of the two members of that board one, without consultation with the other, indorsed the schedule with his approval; but the other member refused his approval and so indorsed the paper. Thus the matter stood, when on March 31, 1908, by a change in the statute and in the form of the city government, the board of public works was abolished and its authority and powers were conferred upon the city council. Thereafter the council caused notice to be given to the owners of the property assessed of time and place where their objections, if any, to such assessments would be heard. Gilcrest & Co. and twenty-six other property owners appeared and filed objections. After hearing the complaints, the council acting under the advice of the city attorney, passed a resolution declaring that it had "no power to review or set aside the action of the former city officers, and therefore had no power to pass upon the objections as far as they relate to the character and quality of the improvement, and as to such matters the council is bound by the action of the former city officials, and therefore declines to consider or determine the objections in respect thereto." Following this resolution, the council proceeded to approve the schedule of assessments and levy the same as reported by the engineer. From this action the objectors appealed to the district court, where the several cases were consolidated. In that court the paving company intervened, alleging compliance with its contract, and praying that the assessments be enforced or, if held void, that it have judgment against the city for the amount of its claim. Issue was taken upon the petition of intervention, and, as a further ground for avoiding the assessments, plaintiffs alleged a failure to give proper notice of hearing upon the original resolution of necessity. The district court entered a decree setting aside the assessment and dismissing the petition of intervention, and the city and the paving company have appealed.

I. As the provision of the statute for a hearing upon the resolution of necessity lies at the threshold of the proceeding and is jurisdictional in its nature, we give the objection thereto first consideration. The statute, Code, section 810, provides that such notice shall be by four publications in a local newspaper, and the point made by the objecting property owners is that there were not more than three such publications. On this contention there is a conflict of evidence, but it would seem from the record that the preponderance is with the objectors. In the absence of anything tending to show an estoppel or waiver, such a failure is quite manifestly jurisdictional and fatal to the validity of a tax or assessment based thereon. But such result does not universally follow, for the property owners affected by such proceeding may and often do estop themselves from relying upon the jurisdictional question. *Land Co. v. Des Moines*, 144 Iowa, 625; *Oliver v. Monona County*, 117 Iowa, 45; Hamilton's Special Assessments, sections 725, 727; *Ross v. Supervisors*, 128 Iowa, 427; *Arnold v. Fort Dodge*, 111 Iowa, 152.

The individual objectors to the assessments had petitioned the council for the paving of these streets, and thus set the proceeding in motion. They had been interested observers of the work as it proceeded, and, while numerous objections and protests were being entered by them during its progress, those objections, as far as appears from the record, were confined to the character and quality of the work, and not to the validity of the procedure or the authority of the city to order the paving. So far as they are concerned, the notice of hearing upon the resolution had effected its purpose, and justice requires that they be estopped, when the work is done and their streets improved, to set up a claim that the improvement was wholly unauthorized. We hold therefore that the jurisdictional objection will not avail

1. MUNICIPAL  
CORPORATIONS:  
public improve-  
ment: resolu-  
tion of neces-  
sity: publica-  
tion: waiver.

2. SAME:  
waiver of  
objections:  
estoppel.

those who in effect became parties by uniting in the original proceeding, or later came voluntarily into it pending the execution of the work and sought to compel the due performance of the contract according to its terms. The question is one upon which there is fair room for argument, and many cases can be cited giving more or less support to either contention; but we are satisfied that the rule to which we adhere is a just one contravening no sound legal principle, while the other would very often enable property owners to obtain the benefit of extensive and valuable street improvements and escape contribution to the expense thus incurred.

II. Under the statute in force when this improvement was begun, the city of Des Moines had by ordinance provided itself with a board of public works as provided by

3. SAME: board  
of public  
works: accept-  
ance of im-  
provement.

Code of 1897, section 863 et seq. When an improvement of this nature was ordered by the council, it became the duty of the board to let the contract for its construction.

Code, section 812. It was further authorized to superintend all works of public improvement and accept work done or improvements made when completed according to contract and perform such other service as might be required by ordinance of the council. But where a preliminary notice was required, all proceedings preliminary to and including the passage of the resolution or ordinance were to be taken by the council and the certificate of the engineer that work had been done or material furnished were to be made to the board of public works and orders for payment drawn and signed by it. Code, section 870. All orders and bills subject to its approval were to be indorsed by the members of the board or their reason for failing to do so stated in writing and approved by the council before payment made. Code, section 871. Upon the abolition of the board its powers and duties were conferred upon the city council. Turning now to the record in this case to find just what



part of the duty of the board of public works with reference to the improvement in controversy had been performed when it ceased to exist, we think it must be said that the board's authority to accept the work of the contractor was never exercised. While Code, section 871, is perhaps open to the implication that the approval of a claim or bill by the individual or independent act of the several members in indorsing it was sufficient authority for its payment, yet such is not the case with respect to the acceptance of the work. The statute does not charge the individual members of the board with this duty. It is the board which accepts the work. A board consisting of two or more members can discharge any duty imposed upon it as such only by action as a body, and this implies meeting, consultation, deliberation, and agreement of all or a majority of the members. So far as we can ascertain, the matter was never the subject of consideration by the board, and certainly the board never voted or agreed that the work was done according to contract. The act of one member in affixing his approval to the tentative schedule of assessments prepared by the engineer and the refusal of the other member to give his is certainly very far from being such an acceptance as would bind either the city or the property owners. Nor can it be said that the approval of such schedule by the engineer acts as a "casting vote" under chapter 26, Laws of the 32d General Assembly, for a tie or disagreement calling for such casting vote can only exist where there has been a meeting of the board and the inability of the members to agree has been developed by a vote or other sufficient declaration.

But even if we could say that the board did "accept" the work and approve the schedule, we are not prepared to hold that such acceptance would bar the property owners from insisting before the council that the proceedings had been irregular, or that the contract had not been per-

4. SAME: assessments: objections: right of property owners to be heard.

formed in substantial compliance with its terms. It is the clear intent of the statute (indeed, its validity would be open to serious doubt were it otherwise) to give the property owner opportunity somewhere along the line to deny or contest the due performance of work the cost of which is to be imposed upon him. There was never at any time any provision for such a hearing before the board of public works. The duty of the board was fully performed when it approved the work and made its schedule of proposed assessments and filed the same with the city council. It was then the duty of the latter body to give notice and opportunity for objections by persons conceiving themselves aggrieved. Code, section 823.

True, the nature of the complaints to be thus considered is stated in somewhat vague and general terms as being "all objections thereto, or to the prior proceedings, on account of errors, irregularities or inequalities;" but we think it must be held to include the right to object that the work contracted for has never been performed, or that it has been performed in such defective manner that the property ought not to be subjected to the burden of paying for it. Now in this case the parties had no hearing before the board of public works upon their contention that the work was not done according to contract and the improvement was therefore practically worthless. Indeed, the law provided for no such hearing before that body. Notwithstanding this conceded fact, the council, after notifying the property owners to present their complaints for hearing and adjustment, wholly refused to entertain their objections on the theory that in order to do so it would have to set aside the action of former city officers and that such was beyond its authority. In this we think the council clearly erred. In the first place, as we have already suggested, there is no sufficient showing that the board of public works ever did act in the matter, and in the next place even the acceptance of the work by the board would still

leave the question open to review by the council upon the property owners' objections to the validity or correctness of the assessments. The denial of such hearing operated to deprive the objectors of a substantial right, and the assessment following such action can not be upheld. The decree below must therefore to this extent be affirmed. In our judgment, however, the error to which we have adverted ought not to deprive the city or the contractor of the right to contest the objections filed by the property owners, but full justice will be done by permitting the city to resume the proceedings at the point where the error was committed and pursue them to completion in the regular course provided by the statute, and the decree will therefore be so far modified as to provide that the setting aside of the assessments shall be without prejudice to the right of the council to give new notice of a day on which the objections of the property owners will be considered and passed upon; the proceedings thenceforward to be conducted as if the erroneous ruling and assessments had never been made.

III. The owners of one or two of the lots did not petition for the improvement, and no conduct on their part is shown on which a waiver or estoppel can be predicated.

5. SAME: invalid  
assessment:  
liability of  
city.

As to these lots the assessments are entirely void and not merely erroneous. This defect is chargeable to the city or its officers and not to the contractor, and, in the event that upon further hearing it is found that the contract has been substantially performed, then, so far as the cost of the improvement would otherwise have been chargeable upon these lots, the contractor will be entitled to judgment against the city.

IV. Appellees allege that the claim of waiver or estoppel argued by the appellants is unavailing because there is no pleading raising such an issue.

6. SAME:  
estoppel:  
pleadings:

We think otherwise. This controversy was initiated before the city council and comes here by successive appeals. Proceedings of this nature are nec-

essarily lacking in much of the formality observed in the framing of issues in the courts of record. They do not contemplate formal pleadings. The issues are ascertained by reference to the record of the council's actions and to the written objections filed by the property owners. No answer is called for, no demurrer would be allowed, and we see no reasons why every fact tending to show that the objections ought not to be sustained is not admissible in evidence even though not formally pleaded.

Other matters have been argued, but for the most part they have reference to the kind and quality of the work done by the contractor, an issue which we do not undertake to consider.

The decree below will be modified as indicated in the second paragraph of this opinion, and as thus modified affirmed. The costs of the appeal in the district court will be taxed to the city of Des Moines, and costs in this appeal will be apportioned one-half to the appellants and one-half to the appellees.

*Modified and affirmed.*

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STATE OF IOWA, Appellee, v. ANDREW H. SORENSON,  
Appellant.

**Criminal law: BURGLARY: CIRCUMSTANTIAL EVIDENCE.** Burglary is  
1 provable by circumstantial evidence; and while the mere entry of a building is not of itself proof of felonious breaking, it bears upon that question: Thus where the evidence showed that defendant was wrongfully in the building, that he was there for the purpose of committing larceny and did commit larceny, that the windows were closed and the doors locked, and that there was no opening through which he could have entered the building without a breaking, refusal to direct a verdict for defendant on the ground of failure to prove a breaking was proper.

**Same.** Where the state relied on circumstantial evidence to estab-  
2 lish the breaking, it was permissible to show the condition of

the doors and windows, both immediately before and after the alleged burglary, for the purpose of showing that defendant could not have entered through them.

**Same.** The testimony of a witness that he entered the burglarized building immediately after the arrest of defendant as he was escaping from the building, by pushing in one of the doors, rendered the testimony of another witness to a like experiment unobjectionable, because subsequently made.

**Same: EVIDENCE: SELF-SERVING STATEMENTS.** Evidence that defendant stated prior to the commission of the crime that he was going to the burglarized building to see the manager was inadmissible as a self-serving declaration; in the absence of any circumstances rendering the same pertinent.

**Same: BURGLARY: WHAT CONSTITUTES "BREAKING."** Where the door of a building was so nearly closed that the accused could not enter without pushing the door further open, the wrongful entry of the building by thus pushing the door is burglary within the meaning of the law.

Evans and Weaver, JJ., dissenting.

**Same: FLIGHT: KNOWLEDGE OF ACCUSATION: INSTRUCTION.** Flight of an accused is a circumstance indicative of guilt only where he had actual knowledge of a suspicion or accusation against him; simply reason to know of such suspicion or accusation is not sufficient. The error of the instruction in this instance, however, is technical and without prejudice; as the alleged flight was so closely connected with the commission of the alleged offense as to render it admissible in evidence, regardless of the above rule.

**Evidence: ADMISSION: DISCRETION.** The discretion of the trial court in admitting evidence on rebuttal which was properly a part of the state's main case will rarely be interfered with on appeal.

*Appeal from Polk District Court.*—HON. CHARLES S. BRADSHAW, Judge.

TUESDAY, NOVEMBER 12, 1912.

THE defendant was indicted for burglary. He entered a plea of not guilty. A trial was had to a jury. A verdict of guilty was rendered, and judgment entered thereon. Defendant appeals.—*Affirmed.*

*E. C. Mills* and *E. D. Perry*, for appellant.

*George Cosson*, Attorney-General, and *John Fletcher*, Assistant Attorney-General, for the State.

EVANS, J.—The defendant was charged with burglariously breaking and entering a certain building or storehouse of the Maryland Packing Company, wherein goods and merchandise were kept for sale and deposit, with the felonious intent then and there to commit the crime of larceny. The alleged crime was committed about 10:30 p. m. on November 22, 1910. The storehouse contained a large amount of dressed poultry which were in course of preparation for the Thanksgiving trade. The employees of the packing company were at work in the building until about 10 p. m., and left at that time. The building in question was situated at the northwest corner of West Second street and Court avenue, in the city of Des Moines. It extended northward on the west side of Second street to an alley. At the north end of this building, and facing east and opening on the sidewalk on West Second street, was a large sliding door about twelve feet by twelve feet in dimensions. This sliding door was hung from, and rolled upon, an iron track on the inside of the building. When closed, the door fitted into a crevice or groove at the north end, and fastened by means of a hook, which attached the door to a staple in the jamb at the north end. At the south end of the door on the inside attached to the ceiling and running thence perpendicular to the floor was a large four by four post. This four by four post held the south end of the door in position, and the door slid between the wall and the four by four post. About two and one-half feet from the floor was a two by four firmly attached to the four by four post, and running thence parallel to the wall and floor southward along the inside of the east wall of the building, the south end of which two by four was fastened to a partition wall.

In opening or closing this door, the door was rolled upon the track through a narrow space, bounded on the east by the inside of the east wall of the building, and on the west by the vertical four by four post, and the horizontal two by four. The door was of two thicknesses of boards, and was three inches thick. The building also contained an office door opening on the same street, and near the southeast corner of the building. At the north end was a window opening on the alley. On the east side there were two or more windows opening toward the street. Within the building and in the north part thereof was a wire partition or coop for chickens. There were also a considerable number of dressed turkeys packed in barrels and covered. A small gaslight about "two-thirds lit" was burning in this part of the storehouse. We are unable to learn from this record whether this light was left burning by the employees of the packing company, or whether it was only discovered in connection with events relating to the defendant which will hereafter appear. One Miller, a "merchant police," observed the light in the storehouse. He went to the sliding door, and undertook to open it, but found that it was fastened from the inside. He stepped from the door to the alley, four or five feet distant, and while standing there the defendant suddenly opened the sliding door from the inside, and rushed out. Miller ordered him to "halt." But the defendant ran down the alley with Miller in pursuit. After shooting once over his head, Miller accomplished the arrest. Some dressed turkeys had been brought by the defendant as far as the door, and were left there when the race began. The manager of the packing company, who with the other employees had left the building shortly before, came to the building upon call of the police. Careful examination was thereupon made of all the windows and doors of the building in order to ascertain where and how the defendant had entered. No visible marks were discovered anywhere from which such fact could be directly ascer-

tained. One window was partly open, but the opening was covered with a wire lattice work which was undisturbed. On the trial the theory of the prosecution was that the defendant entered in some way through the sliding door. It was shown by testimony on the part of the state that such sliding door was fastened on the inside by a hook and staple. It was also shown that on the night of the arrest and immediately thereafter it was discovered that the bottom of the four by four post against which the sliding door rested at its south end was loose, and that it "wiggled," that because of that it was possible to push the south end of the sliding door in to such an extent as to enable a person to crowd in through the opening thus made. Other evidence in the case will be noted in appropriate connection in the later discussion of the various features of the case.

I. At the close of the evidence, the defendant moved for a directed verdict on various grounds. The substance of them all was that there was not sufficient evidence of a

breaking to warrant a submission to the jury.

1. CRIMINAL LAW: burglary: circumstantial evidence. It is the argument that, because the state is unable to point out except by inference and conjecture the place where and the manner how the defendant entered the building, there is a total failure of proof of the *corpus delicti*. It must be conceded that the mere entry by the defendant is not of itself proof of a felonious breaking. Nevertheless, it is a very important circumstance as bearing upon that question. The crime of burglary, like any other, may be proved by circumstantial evidence. The circumstances relied upon by the state in this case are that the defendant was wrongfully in the building; that he was there for the purpose of committing larceny and that he did commit it; that all the windows were closed, and that both doors were fastened and locked; and that there was no opening left through which the defendant could have entered the building. If these circumstances were proven to the satisfaction of the jury, they were sufficient to war-



rant deduction therefrom by the jury that the entry must have been effected by a breaking. If it was proved that the defendant was in the building for a felonious purpose, and that there was no opening through which he could have entered, it was a fair inference of fact that he must have entered by breaking. It is not essential in a legal sense that there be found visible marks of a burglary in the form of broken locks or broken glass or uplifted windows. We find nothing contrary to this view in any of the many authorities cited by appellant's counsel at this point. Defendant's motion to direct a verdict was therefore properly overruled.

II. Objection was made by the defendant to the testimony of certain witnesses descriptive of the condition of the windows; the argument being that there is no evidence tending to show that the defendant entered  
2. SAME. through any of the windows. The very purpose of the evidence was to show that the condition of the windows was such that he could not have entered through them. The case of the state resting at this point wholly upon circumstantial evidence, it was clearly proper for it to show the condition of all doors and windows both immediately before and immediately after the alleged crime.

III. One Vail was a witness for the state. He was the manager of the packing company. He, as well as Miller, testified to the discovery of the loosened condition of the four by four post at its lower end immediately following the alleged burglary. He  
3. SAME. also testified that on the afternoon or evening of the following day he experimented by pushing in the south end of the sliding door, and passing through the opening thus made. Objection was made to this evidence on the ground that it was too remote in time, and that there was no showing that the conditions remained the same as they were in the preceding night. It is also claimed affirmatively that the conditions were not the same in that the barrels and

coops were piled up the night before against the horizontal two by four. It appeared, however, from the testimony of the witness Miller that this same experiment was made the night before, immediately after the arrest, and that it was so made by Vail. There is a conflict between the evidence of Miller and Vail at this point, in that Vail testified that it was in the evening of the next day that he passed through the opening. The conflict in the evidence at this point did not render the testimony of either witness inadmissible. It appearing from the testimony of Miller that the experiment was made immediately after the arrest, we can see no objection to further testimony that it was made, even though it contradicted the first witness as to the time it was made. The testimony of Miller, therefore, furnishes sufficient reason for the admissibility of that of Vail, and we need not consider the question whether the testimony of Vail upon that point would have been otherwise objectionable.

IV. The defendant offered to prove by the witness De Vinne that shortly before 10 o'clock the defendant told De Vinne that he was going down to the warehouse of the Maryland Packing Company to see Vail, the manager. This testimony was excluded on the objection of the state as being incompetent and self-serving, and defendant complains of such ruling. We think the ruling was proper. Appellant cites to us *State v. Driscoll*, 44 Iowa, 65. In that case statements made by the defendant were introduced in evidence against him by the state. In this case the defendant offered to prove his own previous statements in his own behalf. A state of the evidence might arise in a given case, where such evidence could properly be received as corroborative evidence only. It is not offered as such here. The defendant did not testify to any circumstance which made such a statement pertinent. Neither did he testify that he went to the storehouse for such purpose. He was not a witness in his own behalf. The only purpose of the

4. SAME:  
evidence:  
self-serving  
statements.

offered testimony, therefore, was that it should be deemed as independent testimony of the intent of the defendant at the time of making such statement. This was "shortly before 10 o'clock."

If it had been admitted for that purpose, it could only prove that the defendant was not guilty of any crime or felonious intent up to that point of time. It was not claimed by the state that he was. Even if he had come to the building, with the intent only to see the manager, he was none the less guilty, if, after discovering the absence of the manager, he then formed the intent to break, enter, and steal. There was no error in this ruling of the trial court.

V. The defendant asked the court to give the following instruction: "The burden of proof is upon the state to prove beyond a reasonable doubt that on the night in

5. SAME: burglary: what constitutes "breaking."

question the north door of the building occupied by the Maryland Packing Company was closed. Unless you find beyond a reasonable doubt that at the time the defendant attempted to enter said building said north door was closed, your verdict will be for the defendant." This instruction was refused. The only instruction given by the trial court covering the point was instruction No. 6, as follows: "In order to constitute the crime charged, it is necessary that there be a breaking and entering of the building. You are instructed that, to constitute such breaking and entering, it is not necessary that any actual injury be done to said building. An actual breaking may be by lifting, removing, or displacing a latch, or turning a door knob in a door, or removing any part or portion of said building which is an obstruction to the entering of said building." There was some evidence introduced on behalf of the defendant and some elicited by cross-examination of the state's witnesses which might have caused the jury to entertain a reasonable doubt as to whether the sliding door had been fully closed when the employees

left that night. The importance of this evidence was emphasized somewhat by the fact that it was conceded by the witness Vail, who was acquainted with the defendant, that he had had a conversation with the defendant at this building earlier in the day wherein he told him that he wanted to see him before he (defendant) left town, and that he would be at work at this plant in the evening until ten or eleven o'clock. Other instructions were asked by the defendant to the effect that, if the door were "partly open," a pushing of the same further open could not constitute a breaking. These were refused.

There is a conflict in the authorities on this question. The numerical majority of the cases favor the contention of the defendant to the effect, that, if a door be partly open, it is not a "breaking" to push the same further open. Indeed, the older cases were practically unanimous to this effect. *Commonwealth v. Steward*, 7 Dane, Abr. 136; *Commonwealth v. Stephenson*, 8 Pick. (Mass.) 354; *Commonwealth v. Strupney*, 105 Mass. 588 (7 Am. Rep. 556); *Rex v. Smith*, 1 Moody (Eng.) 178; *State v. Long*, 5 Ohio Dec. 617; *Timmons v. State*, 34 Ohio St. 426 (32 Am. Rep. 376); *May v. State*, 40 Fla. 426 (24 South. 498); *Smith v. Commonwealth* (Ky.) 128 S. W. 68 (27 L. R. A. (N. S.) 1023). See, also, cases collated in 6 Cyc. 174. In the later cases some of the courts have repudiated this rule as being unreasonable and illogical. The first of these cases appears to be *Murmutt v. State* (Tex. Cr. App.) 67 S. W. 508. This has been followed by *Claiborne v. State*, 113 Tenn. 261 (83 S. W. 352, 68 L. R. A. 859, 106 Am. St. Rep. 833); *People v. White*, 153 Mich. 617 (117 N. W. 161, 17 L. R. A. (N. S.) 1102, 15 Ann. Cas. 927). The majority of this court are disposed to follow the lead of the last cited cases, and to hold that, if a door be so nearly closed that the accused could not enter through the opening without pushing the door further open, then such pushing will constitute a "breaking" within the meaning of the law.

The minority, including Justice Weaver and the writer hereof, are disposed to concede the force of logic in the majority view. In view, however, of the great weight of previous authority to the contrary, they think that the present holding savors somewhat of the *ex post facto*. It has always been in the power of the Legislature to adopt a definition of "breaking" in accord with the present holding, but it has not done so. In section 4791 it did provide that an entry without breaking should be punishable where such entry was in the nighttime, and the building a dwelling house. In all other respects the definition of burglary is left to judicial decision. In view of the uniform judicial definition, so long followed by the courts and acquiesced in by legislatures, it is the minority view that an innovation ought not to be lightly adopted. On the other hand it must be said that no previous case is overruled by the present holding, and that some of the previous utterances of this court are somewhat suggestive of the direction now taken by the majority holding. *State v. O'Brien*, 81 Iowa, 93; *State v. Coonors*, 95 Iowa, 485.

VI. In the tenth instruction the trial court dealt with the attempted escape of the defendant from the "merchant police" at the time of his escape. The instruction advised the jury that they were justified in considering such flight as a circumstance *prima facie* indicative of guilt, if the "defendant *knew or had reason to know* that the person from whom he ran was an officer of the law." The defendant complains particularly of that part of the instruction above italicized. The evident intent of the trial court was to state the rule which has heretofore been announced in some of our previous cases. *State v. Seymour*, 94 Iowa, 699; *State v. Poe*, 123 Iowa, 118; *State v. Hetland*, 141 Iowa, 524. The statement of such rule has usually been predicated upon at least two propositions: (1) That the defendant knew that he was accused or suspected of crime. (2) That he

6. SAME: flight:  
knowledge of  
accusation:  
instruction.

fled to avoid arrest therefor. So far as the statement of such rule is concerned, we think that *actual* knowledge on the part of the defendant of the suspicion or accusation against him is essential as distinguished from mere *constructive* knowledge. In civil cases persons are often held, as a matter of law, to know that which they "had reason to know;" but such a rule has little application in a criminal case where the guilty mind is the gist of the offense. True it is that, if the facts were such as to give the defendant "reason to know" that Miller was an officer, a jury would be warranted in drawing the inference of actual knowledge. But, if the circumstances were not such that a jury could find *actual* knowledge therefrom, then it was not sufficient simply to show that he had "reason to know." Defendant's objection to this qualification is therefore well taken.

The error, however, is wholly technical, and without prejudice under the undisputed facts in the case. The alleged flight involved here was so closely connected in point of time with the commission of the alleged offense that it was clearly admissible in evidence regardless of the application of the rule to which we have referred. In other words, it was not necessary for the state to bring such circumstance within the rule indicated in order to render it admissible. If admissible, it had some tendency indicative of guilt. The weight of it was to be determined by the jury like that of any other circumstance and in the light of all the evidence in the case.

Some complaint is made of certain evidence which was permitted upon rebuttal, whereas it should have been introduced as a part of the main case. It is  
7. EVIDENCE:  
admission:  
discretion.  
sufficient to say that the discretion of the trial court on such a question is not often interfered with here.

Other minor questions are argued. We discover no error in the record.

The judgment below must be—*Affirmed*.

## STATE OF IOWA V. JAMES O'CALLAGHAN, Appellant.

**Criminal law: EVIDENCE OF ACCOMPLICE: CORROBORATION.** The uncor-  
1 roborated testimony of a confessed accomplice is not sufficient to convict one of a crime; and the corroborating evidence must connect defendant with the offense, and be independent of the mere showing of its commission or the circumstances thereof. It is not necessary, however, that the accomplice be corroborated in every material fact; it is sufficient if some of the material facts are so corroborated that the jury is satisfied with their truth, and are thus induced to believe that his entire testimony is true, though not otherwise corroborated. The accomplice in this case is corroborated by sufficient evidence to connect defendant with the offense and to sustain conviction.

**Same: ADMISSION OF EVIDENCE: PREJUDICE.** On a prosecution for  
2 breaking and entering in which defendant testified that he had no talk with an accomplice about meeting any person prior to the burglary, and that he did not agree to meet any one afterwards, and that the accomplice had not told him that he agreed to meet any one at a specified place, defendant was not prejudiced by refusal to permit him to state whether he had arranged to meet the other parties to the crime at any particular place, or if he had so agreed to state the place.

**Same: ADMISSION OF EVIDENCE: PREJUDICE.** Where a confessed ac-  
3 complice testified that he had not been promised immunity because of his attitude in the matter, but that he hoped to get off easier, refusal to permit his cross-examination as to whether he had ever been tried on the charge against him, or had pleaded guilty or not guilty, was not prejudicial to defendant.

**Same.** Refusal to permit the cross-examination of an accomplice  
4 as to the business of his wife before he married her, and concerning their prior relations, was proper.

**Same.** Where the defendant was permitted to deny any inference  
5 to be drawn from the evidence of the state that he unlocked the windows of the building burglarized prior to the burglary, he was not prejudiced by a refusal to permit him to state whether he was in the basement of the building where the window was opened and who was with him.

**Same: EVIDENCE OF GOOD CHARACTER: INSTRUCTION.** Where the state  
6 relied almost wholly upon circumstantial evidence, an instruction that the previous good character of defendant could be considered for the purpose of rebutting the presumption of guilt arising from such testimony, and that it should be considered in its bearing upon the whole case, regardless of the conclusive or inconclusive character of the testimony, and given such weight as the jury thought it entitled to, was proper, and not subject to the objection that it told the jury it could only be considered where circumstantial evidence was relied upon.

**Same: FLIGHT AS INDICATIVE OF GUILT: INSTRUCTION.** Where the  
7 court told the jury that if they found the crime was committed as charged, and that if the defendant knew or had reason to know that the persons from whom he ran, if he did run, were officers, and that if he ran away from them or attempted to escape arrest, then they could consider such flight as a circumstance *prima facie* indicative of guilt, to be considered with all the evidence in determining the guilt or innocence of defendant, was not erroneous as charging that flight is *prima facie* indicative of guilt.

**Same: BURGLARY: EVIDENCE: SUFFICIENCY.** The evidence in this  
8 case is held to justify conviction for aiding and abetting the commission of the crime of burglary.

*Appeal from Polk District Court.*—HON. CHAS. S.  
BRADSHAW, Judge.

TUESDAY, NOVEMBER 12, 1912.

DEFENDANT, with three others, was indicted for the crime of breaking and entering the Polk county courthouse. He was separately tried, found guilty of the offense charged, and sentenced to the penitentiary for the term of ten years. From the judgment imposed, he appeals.—*Affirmed.*

*Sullivan & Sullivan and Parsons & Mills*, for appellant.

*George Cosson*, Attorney-General, and *John Fletcher*, Assistant Attorney-General, for the State.



DEEMER, J.—Some time after midnight of March 31, 1911, two men, known as Tom Hatch and Peter Juhl, who were jointly indicted with defendant, entered the Polk county courthouse through a basement window, went into the office of the county treasurer, and, finding an employee there asleep, they turned him over on his face, tied his hands behind his back, bound his feet together, and left him; one of the men saying, "You need not be alarmed, we are going to have some celebrating, probably a good deal of noise, and if you keep still you will not be hurt. I am a bad man, and a man of my word." The two then went into the main room of the treasurer's office where the door of the vault was located and tried to blow open the safe. Their efforts were unsuccessful, but the explosion was so loud that they thought it advisable to leave the building, which they did, retiring through the window by which they had entered. One J. A. Rhodes was ~~also~~ indicted with the defendant, and the four men, defendant, Hatch, Juhl, and Rhodes, were discovered by some policeman near what is known as Fourth and Chestnut streets shortly after the crime was committed, who attempted to arrest them. Hatch and Juhl escaped and have never been apprehended, but Rhodes was taken into custody, and O'Callaghan temporarily escaped, but was subsequently arrested. The claim made for the state is that all were engaged in committing the offense—Hatch and Juhl as principals, and Rhodes and O'Callaghan as accessories—and the principal question in the case is the sufficiency of the testimony to connect O'Callaghan with the crime. If the witness Rhodes is to be believed, there can be no doubt of defendant's guilt; but he is a confessed accomplice, and his testimony is not sufficient unless it be corroborated by other testimony tending to connect the defendant with the commission of the offense. Such corroboration is not sufficient, however, if it merely shows the commission of the offense or the circumstances thereof.

1. CRIMINAL LAW:  
evidence of  
accomplice:  
corroboration.

Code, section 5489; *State v. Smith*, 102 Iowa, 656. But it is not necessary that the accomplice be corroborated upon every material fact to which he testifies. It is enough if he be so corroborated on some of the material facts as to satisfy the jury that he spoke the truth with reference thereto, and thus induced the belief that his entire testimony is true, although not otherwise corroborated. *State v. Feuerhaken*, 96 Iowa, 299; *State v. Hall*, 97 Iowa, 400; *State v. Allen*, 57 Iowa, 431; *State v. Hennessy*, 55 Iowa, 299.

Defendant had been employed in the county treasurer's office for about a month just preceding the burglary, and Rhodes testified that he made the arrangements with O'Callaghan to have a part in the commission of the crime and brought about a meeting between him (defendant) and Hatch about ten days prior to the time the offense was committed. O'Callaghan was advised by Rhodes that Hatch had been implicated in a safe blowing at Foster's Opera House, and according to Rhodes defendant said that he knew where there was a good one, and that "it would take three overcoats to carry it away." Rhodes also testified that defendant met Hatch on Wednesday or Thursday night before the burglary at the corner of Fifth and Grand avenues, where they talked together for ten or fifteen minutes. On the evening just preceding the burglary, defendant and Rhodes were together in the vicinity of the courthouse and visited a number of saloons where they drank together. Later they went to the federal building, which is just east of the courthouse, and there met Hatch and Juhl. Defendant said that he would go over to the courthouse and see if the window was right, left the group for a few minutes, and upon his return said that it was all right, that he had raised it up an inch. He had told Rhodes before meeting the other parties that he had fixed the window so that it could be opened from the outside, and either he or Rhodes had communicated this information to the other parties. Dis-

covering a light in the treasurer's office, O'Callaghan said to his companions that sometimes some of the employees worked rather late. As they stood there the light went out and then on again, and defendant and Hatch walked around to the southwest corner of the building to see if there were any lights in the south or west part of the structure, and Juhl and Rhodes went to the northeast corner to see if they could discover any lights. Having made their observations, the parties all returned to the government building. The light was still burning in the treasurer's office, and it is claimed that defendant went into a hotel just north of the government building and telephoned to the treasurer's office to see if any one was there. After this the four went to the southwest corner of the courthouse, and defendant and Hatch made another trip around the building for the purpose of discovering if there were any more lights or other evidence of the presence of persons in the building. After their return they joined their companions, and about this time the light in the treasurer's office went out. At O'Callaghan's suggestion Rhodes then went to a point north and west of the building to see if any one came out at either the north or west door. When he returned he found the other three men in front of the entrance to the Union Station south of the courthouse. Hatch then said that he had seen some one in the building, and O'Callaghan remarked, "There was some hoosier by the name of Keller who sometimes slept there and that he would probably be asleep in a few minutes." All the parties then went to the east end of the Union Station, and there defendant and Rhodes stayed while Hatch and Juhl went to a basement window just south of the east entrance to the courthouse which they raised, and thus gained entrance to the building. Defendant and Rhodes watched their codefendants until they disappeared into the building, and, after some parleying as to where they should go, it was finally agreed that they should go to a nearby poolroom, which they did, there meeting

some acquaintances of Rhodes, and the four there had a drink. From there this newly formed party went back to the Union Depot, and were there informed that some one had blowed a safe in the courthouse. Almost immediately they saw Hatch and Juhl coming down the street near the depot; one of them carrying a suit case. Defendant and his companion then turned west on Cherry street, the first street west of the courthouse, and went west to Eighth, thence north to Locust or Walnut street, and thence east again to the Kirkwood Pharmacy, Floyd Coon's Drug Store, and the Chicago Grill, respectively, where they tried to get liquor. From the place last named they went up Fourth street to its junction with Chestnut, at which place it is claimed by previous arrangement they were to meet Hatch and Juhl. At any rate, they here met the last-named persons, each of whom then had a suit case, and discovered upon inquiry from them that the enterprise had been unsuccessful. The four remained here fifteen or twenty minutes, when some policemen appeared. Hatch and Juhl immediately stepped into an alley. Here some shots were exchanged between them and the police. O'Callaghan started to run west to Fifth street, and, reaching that street, he turned north and ran in that direction. Rhodes was taken into custody, and O'Callaghan next appeared at what was known as Clark's Hotel, east of Third street, where he slept the remainder of the night. At that time he was rooming at a house on University avenue, but he did not attempt to return to his room.

This in substance is the testimony of Rhodes, together with some of the undisputed facts disclosed by the record. The testimony offered in support of Rhodes corroborates him with reference to his being with defendant and the other parties to the charge at every point save as to telephoning the treasurer's office from the hotel, and as to defendant's going over to the courthouse to see about the condition of the window. Defendant was a witness on his

own behalf, and he does not deny his association with all of these men and his meeting with them, not only about and near the courthouse on the evening in question, prior to the commission of the offense, but also at the places named by Rhodes after the crime was committed. Indeed, he admits that he was with these men at the places named. He also admits that he had a conference with Hatch at the corner of Fifth and Grand avenues before the parties met, on the evening the crime was committed, at the government building. These facts alone, either admitted by the defendant or proved by independent testimony, were sufficient to justify a finding by the jury that Rhodes told the truth and that defendant in fact aided and abetted the commission of the offense.

II. Some rulings on the admission and rejection of testimony are complained of. Rhodes testified that it was agreed that he and defendant should meet Hatch and Juhl after the crime was committed on Chestnut street. Defendant, as a witness on his own behalf, was asked as to whether he had any agreement to meet these parties in front of the Grant club, or to meet anybody at that point, or, if he was to meet them, where the place was. Objections to such questions were sustained, and of this complaint is made. These rulings could not be sustained save for the fact that the witness was permitted to testify directly to the fact that he had no talk with Rhodes prior to the burglary about meeting any one, and further testified, without objection, that he had no agreement to meet anybody after the burglary was committed, and that Rhodes did not indicate to him that he had an agreement to meet anybody at Fourth and Chestnut, or on Chestnut. The rulings were without prejudice.

On cross-examination Rhodes was asked as to whether he had ever been tried on the charge against him, and as to whether he had pleaded guilty or not guilty. It was sufficiently shown that Rhodes was an accomplice, and the

2. SAME: admission of evidence: prejudice.

nature of his plea, or whether he had been tried or not, was material only to show that, because of his connection with the matter, he was unworthy of belief, or that, by reason of testifying against defendant, he had been promised, or was expecting, some kind of immunity. As to the first point Rhodes admitted his guilt, and as to the second he subsequently testified that he had not been promised any immunity, but that he hoped to get off easier because of his attitude in the matter. This was all that defendant was entitled to.

3. SAME:  
admission  
of evidence:  
prejudice.

Defendant also propounded questions to Rhodes about his wife's business before he married her, and as to their relations before that time, but objections thereto were sustained. There was no error here. We must

4. SAME.

assume that, no matter what the facts, the woman reformed upon her marriage to Rhodes. A part of an answer given by defendant to a question propounded to him was stricken as a conclusion. The ruling was correct.

The following record discloses the next objection: "I was not down in the basement beneath the treasurer's office March 31, 1911. Q. Were you ever down in that place?

A. Yes, sir. Q. At any time and with whom?

5. SAME.

(Objected to as incompetent, irrelevant, and immaterial, leading and suggestive. Objection sustained, and defendant excepts.) Q. Will you now state to the jury whether or not, in the afternoon or on the day of March 31, 1911, you unlocked any of the windows in the basement of the treasurer's office in the Polk county courthouse? A. I did not. I never told Rhodes that I had unlocked any windows or would unlock any windows. I never told Rhodes whether myself or the little fellows were down to see whether the windows were unlocked. Q. Were they down there at all? A. I did not know them. I never told Rhodes they were down there. I had no knowledge on the night or evening of March 31, 1911, or at any time prior

thereto, that there was a contemplation of robbing or breaking into the courthouse of Polk county." We see no error here of which defendant may complain. He was permitted to deny any inference that a jury might draw from the testimony introduced by the state. So much for the rulings on testimony.

III. Defendant introduced testimony in support of his good character, and the trial court gave the following instruction with reference thereto: "(15) The defendant

6. SAME: evidence of good character: instruction.

has introduced testimony tending to show his previous good character as to the trait involved in the offense charged in the indictment. It is competent for a person, accused of a crime, to prove, as a circumstance in his defense, that his previous character, as to the trait involved in the offense charged, was good. Previous good character is not, of itself, a defense, but it is a circumstance to be considered by the jury in connection with all the other evidence in determining the guilt or innocence of the accused. *It is a circumstance which may be shown for the purpose of rebutting the presumption of guilt arising from circumstantial evidence.* It may be considered as tending to show that a man of such character would not be likely to commit the crime charged. It should be given consideration irrespective of whether other evidence is conclusive or inconclusive, and it is for the jury to determine, under all the facts and circumstances in the case, what weight should be given to such evidence." The sentence which we have italicized is complained of. It will be noticed that the instruction does not say that good character can be considered only where circumstantial evidence is relied upon. If it did, it would be wrong. As the case was bottomed almost wholly on circumstantial evidence, the trial court properly instructed that good character could be shown for the purpose of rebutting the presumption of guilt arising from such testimony. But it also instructed that it should be considered in its bearing upon the whole



case, notwithstanding the conclusive or inconclusive character of the testimony, and given such weight as the jury thought it was entitled to. There was no error here. *State v. Krug*, 136 Iowa, 231.

IV. This instruction was given upon the matter of flight or effort to escape: "(14) Evidence has been introduced tending to show an attempt, on the part of the defendant, to escape from the officers of the law. If you find from the evidence, beyond a reasonable doubt, that the offense of breaking and entering was committed, at the time and place substantially as charged in the indictment, and further that the defendant knew, or had reasons to know, that the persons from whom he ran, if he did so run, were officers of the law, and further that the defendant ran away from or attempted to escape arrest, then you are justified in considering such flight as a circumstance which, *prima facie*, is indicative of guilt, to be considered by you in connection with all the evidence, to aid you in determining the guilt or innocence of the accused. If, upon all the evidence, you entertain a reasonable doubt of defendant's guilt, you should acquit him." This is challenged because of the use of the words, "which *prima facie* is indicative of guilt;" and *State v. Poe*, 123 Iowa, 118, is relied upon. The instruction there considered is not like the one here given. The case is ruled by: *State v. Richards*, 126 Iowa, 497; *State v. Kimes*, 152 Iowa, 240; *State v. Seymour*, 94 Iowa, 699. The authorities last cited sustain the instruction given. The instruction upon the necessity of testimony corroborating Rhodes is complained of, not because it is incorrect, but because it did not go farther and state what would be corroborating testimony. The complaint is without merit. It is sufficient to say that the instructions given sufficiently covered the matter.

V. The verdict has sufficient support in the testimony, and a jury was fully warranted in finding that de-



endant aided and abetted in the commission of the offense.

SAME: burglary: evidence: sufficiency. The case is much stronger than *State v. Arthur*, 129 Iowa, 235. Indeed, it is well to note in this connection that Arthur, defendant in that case, was finally convicted. See *State v. Arthur*, 135 Iowa, 48. There was sufficient proof of a conspiracy to make the acts and declarations of one binding on all.

We have gone over the record with great care and discover no prejudicial error.

The judgment must therefore be, and it is,—*Affirmed*.

THE FIRST NATIONAL BANK OF RED OAK, IOWA, Appellant, v. THE CITY OF EMMETSBURG, IOWA.

Municipal corporations: PUBLIC IMPROVEMENT: EXERCISE OF POWER.

1 A city has statutory power to contract for a public improvement, and in doing so exercises a proprietary or quasi private power for its own benefit and that of the inhabitants, as distinguished from its legislative, public and governmental power; and is governed by the same rules in the exercise of such power as govern private individuals or other corporations.

Same: LIABILITY OF CITY: *Ultra vires*: ESTOPPEL: RATIFICATION. A

2 city having power to contract for a public improvement, irregularities in the exercise of that power will not relieve it from liability for benefits actually received under the contract: Nor can it escape liability on a plea of *ultra vires*, when the contract has been fully performed and it has received the benefits, but under such circumstances it is estopped, the same as an individual, from retaining the benefits and at the same time denying liability. Furthermore under the evidence in this case there was a ratification of the contracts for sewer construction, and a waiver of the right to object thereto.

Same: ACCORD AND SATISFACTION. A compromise, accord and satis-

3 faction by a city with the holder of assessment certificates issued under a public improvement contract is as binding upon it as though a private individual.

Judgments: FORMER ADJUDICATION. The judgment in an action to

- 4 enjoin the enforcement of special assessments, in which the city joined with the contractor and certificate holders as a party defendant, that the cost of the improvement could not be taxed against the plaintiff in that case and enjoining a further levy, but not determining any question between the city and its co-defendants, was not an adjudication of the right of the assignees of the holders of the certificates to enforce the same in a subsequent action.

*Appeal from Palo Alto District Court.*—HON. D. F. COYLE, Judge.

THURSDAY, NOVEMBER 14, 1912.

THE facts are stated in the opinion.

*Reversed and remanded.*

*Carr, Carr & Evans* and *O. M. Brockett*, and *John Menzies*, for appellant.

*E. A. and W. H. Morling*, for appellee.

SHERWIN, J.—This is a suit at law to recover the amount of the unpaid balance due on municipal contracts for the construction of sewers, represented by special assessment certificates for redemption, and for the payment of which defendant negligently failed to make provision. The petition, as summarized by counsel for appellant, alleges as follows:

The issuance by defendant of the certificates to the contractors as pretended payment of and compliance with the contracts therefor.

That the special assessment to create a fund for the payment of such of them as were involved in the suit had been vacated, and further levy therefor enjoined in *Bennett et al. v. Emmetsburg*.

That plaintiff is the present owner and holder of all said unpaid certificates, and of all rights of the contractors

to any remedy for collection of the amount thereof, with interest.

That B. O. Hanger had become liable to the plaintiff as surety for the contractors prior to September 30, 1904, for a large sum of money advanced to enable them to construct the sewers contracted for, and the certificates to be issued therefor, and all rights of the contractors were also pledged as security therefor, both to him and plaintiff, and plaintiff's assignor, Century Savings Bank.

That while so liable, and while a controversy was pending between said contractors and the defendant as to whether said sewer construction had been performed and completed in accordance with the contracts therefor, and under threats then made by the defendant to proceed against said contractors to enforce its remedies for such alleged breach, and on said 30th day of September, said Hanger, acting for himself and said contractors, entered into a compromise contract in writing set out in the petition, in which, in consideration of certain repairs and changes he had made under such demand, and of the further deposit by him of \$688 to be paid to defendant upon its delivery of the special assessment certificates and otherwise performing its covenants in the sewer contracts, all controversy was fully settled.

That thereafter a dispute arose as to the right of the defendant to take down said deposit, because of its failure to levy the special assessment and issue the certificates within the time stipulated in said compromise agreement.

That at the September term, 1908, of said court, the Valley National Bank, holding the rights of said Hanger to said deposit by assignment set out, brought suit therefor against this defendant, and against the depositary, the Farmers' Savings Bank of Emmetsburg.

That the defendant answered therein that it had fully performed said compromise agreement, having therein made said sewer construction comply in all respects with the requirements of the plans and specifications, and had on account thereof become liable on all its covenants in the sewer contracts, and had, as required thereby, made the special assessment and issued the certificates in all respects as in said contracts agreed. All this, it declared in said answer, had been done in reliance upon said compromise

agreement, and pleaded certain alleged facts as an excuse for failure on its part to perform said compromise agreement within the time limited therein, and denied the right of plaintiff to complain of such delay because of alleged laches of Hanger.

That while said suit was pending, and on or about May 13, 1909, the Valley National Bank, plaintiff herein, sold and assigned its chose in action to this plaintiff by a written instrument set out in the petition, which was concurred in by B. O. Hanger by indorsement thereon.

That on or about August 17, 1909, said suit was compromised by the terms whereof the defendant received \$600 of said fund; this plaintiff receiving the remainder after paying the costs of the suit.

That prior to September 20, 1904, Hanger had appeared before the city council of the defendant, and notified them fully of the facts of the relation which created his interest in having the sewer construction made satisfactory and paid for by the defendant as agreed.

That on or about the 19th day of September, 1904, said city council passed a resolution detailing what it claimed were the particular respects in which the work differed from the requirements of the contracts, and directed notice thereof to be served on Hanger and on the contractors, including demand that the same be remedied within ten days thereafter, failing which the defendant would do so and collect the cost thereof from the contractors.

That on the next day such notice was issued and served accordingly. Whereupon Hanger, for himself and said contractors, within said ten days entered upon the work of making the changes thus demanded, and, after having incurred something over \$112 expense therein, substituted for the completion thereof said compromise agreement of September 30th, in the doing of all which he and the contractors relied upon the good faith of the defendant, and believed it thereby became bound to pay for said sewers in accordance with the contracts therefor.

That the sewer certificates all recited among other things that 'it is hereby certified and recited that all the acts, conditions, and things required to be done precedent to and in the issuing of this certificate have been done,

happened, and performed in regular and due form as required by law. And the city of Emmetsburg hereby transfers to the said Shepherd and Hanrahan or assigns all right and interest of the said city of Emmetsburg in the assessment herein described, and the holder hereof is authorized to receive and collect said assessment by or through any of the methods provided by law for its collection as the same matures.'

That the defendant has accepted said sewers, possesses, uses, and controls the same, and enjoys all the benefits of its recognition of the validity of the contracts under which they were constructed.

That certain persons named against whose property the special assessment was levied, this defendant, the county treasurer, the contractors, engineer, Hanger, the Century Savings Bank, and assignors of plaintiff, were parties to the Bennett case.

That plaintiff and its several assignors in extending the credit and entering into the several transactions recited, relied upon the representations, covenants, and conduct of defendant recited, and would not have done so but for such reliance, and were, at the times thereof, ignorant of the fact, if it was a fact, that they were not in accord with the truth.

That this defendant had answered in said Bennett case denying generally and specifically the allegations of the petition therein, and declared the facts as to the controversy with the contractors, and the compromise thereof by the transaction of September 30th, and the performance of it with knowledge of the plaintiffs, estopped them from complaining; further, that they had waived the right, either by failure to object to the assessment upon due notice of proceedings for, or by failure to appeal from, adverse findings of the council on such objections as were then made, and because plaintiffs had petitioned for the sewers and they have been constructed and accepted and the citizens of defendant were then using the same and enjoying the benefits thereof; that they were concluded by the action of the council as a special tribunal, and had waived their right of complaint by failure to pursue such remedy; that such right, if it had existed, had been lost by laches and delay, and because, if the assessment were vacated, 'the defend-

ant would be in danger of an action in behalf of said contractor to recover personal judgment against this defendant for the construction of the said sewer, and thereby jeopardize and imperil the interests of the general taxpayers of the defendant and those who, in good faith, paid their said assessments.'

That in the trial of said Bennett case in the district court, and afterward in the appeal thereof to the Supreme Court, the defendant had united with this plaintiff's assignors in controverting the contentions of the plaintiffs therein as to the invalidity of the sewer contracts, the special assessment, and the certificates, contending therein, among other things, that the success of the plaintiffs therein would subject the defendant to the liability claimed by the plaintiff in the present suit; that its liability had become fixed by the compromise of September 30th if not otherwise; and generally claiming, as does now this plaintiff, that defendant is bound by its covenants in said contracts in view of the premises, and plaintiffs therein should not have the relief sought. And plaintiff herein averred that its assignors relied upon such conduct by the defendant and was led thereby to forego other remedy if any they had.

That defendant had refused, since the entry of final decree in the Bennett case, and still refuses, to take any action to make provision for payment of the balance due on the contracts.

That plaintiff's assignor, the Century Savings Bank, had extended its credit in part upon an order drawn in its favor by Shepherd & Hanrahan, October 31, 1903, on the city of Emmetsburg, and accepted by the latter about November 18, 1903, by which the defendant agreed to pay the money and to issue the certificates provided for in the sewer contracts to said bank. That therein it relied on the same together with said contracts, as creating binding obligations according to their terms, and thereupon made the loan to the contractors, afterwards assigned to plaintiff as shown by 'Exhibit H' to the petition, by reason of which defendant ratified said sewer contracts, waived any right to dispute the validity thereof, and estopped itself from doing so.

That there were many persons and parcels of property affected by said special assessment, not, however, involved

in said Bennett case, and that, as to such, nothing therein had and done was an adjudication.

That defendant should be held liable for the balance due on the contracts, as for a money demand, because of the making of the contracts and the failure to perform them, because it is estopped to deny their validity, because it bound itself thereto by new contracts of compromise, accord, and satisfaction as charged, because it is bound by its action in the Valley National Bank case, in taking the portion of the deposit there in suit on the claims made, based upon the claimed binding effect of the sewer contracts on which the compromise contract rested, as an election of remedies, and because of its ratification of said contracts and waiver of claim of alleged irregularities or illegality thereof.

Different exhibits were attached to the petition, which need not be set out in detail, but some of which will be hereinafter again referred to. The answer admitted "that the two sewer contracts and the several certificates of assessment as set out in the petition 'were executed by the persons named therein' and denied the other averments." It was averred:

That the sewer contracts were invalid because the officers who executed the same had obtained no authority to execute the same, and such invalidity had been adjudicated in the Bennett case. That defendant had not undertaken in said contracts 'to pay for said sewer in any other or different form than as therein specified and that the said Shepherd & Hanrahan, who were the plaintiff's assignors, therein, agreed to accept said certificates of assessment in full payment of the balance due them under said contracts.' That as obligations to pay from general revenues the contracts were void, 'for the reason that the same exceeds the amount of indebtedness which the defendant was authorized by law to incur.' That the resolution by the city council required by section 810 of the Code had not been adopted before making said contracts, nor did the record of its proceedings so show, and no sufficient notice of the passage of such resolution had been given. That a large part of the certificates in question had been issued as part payment

for lateral sewers provided for in the contract of July 3, 1903, as to which lateral sewers the council had not adopted a resolution as required by said section 810, and undertook to give the numbers of such certificates. That the contract of November 6th was for two lateral sewers, as to the proceedings for which there was the same defect.

Count 8 is a plea of abatement as to amount of certain certificates set out, paid under protest to the county treasurer, and involved in suit pending against him by this plaintiff therefor.

Count 9: That the officers of defendant had no jurisdiction to enter into any covenant of warranty contained in the certificates.

Count 10: That plaintiff's assignors had knowledge of all the alleged defects and irregularities in the proceedings of the council affecting said contracts.

The cause was tried to the court, and findings of fact adverse to the plaintiff were, in substance, as follows: That the yeas and nays were not called and entered of record on the resolution of necessity passed for the main sewer. That no resolution of necessity was passed, or notice given, as to the three lateral sewers ordered at the meeting of June 15th. The notice to bidders was defective as stated in the opinion in *Bennett v. City of Emmetsburg*, 138 Iowa, 67. That by oversight one block of the proposed main sewer was omitted from the description in the notice to bidders. On discovery of this, the council, by resolution, authorized the sewer committee to have the contractors construct this block at the same price as the rest of the "submains." Notice to bidders for construction of additional laterals ordered October 15, 1903, was defective as shown in the opinion in the *Bennett* case. And that the construction of the sewers had not been done in accordance with the contracts at the time Hanger made changes, and at the time of the compromise contract of September 30th.



The facts found in the plaintiff's favor are as follows:

(1) That attempt was made by defendant to comply with the statutory requirements preliminary to the execution of the sewer contracts, and afterward to perform the contracts.

(2) The execution of the compromise agreement by Hanger and the attempt by the city in consideration thereof to complete the sewers according to the contracts.

(3) That the council of defendant city passed the resolution authorizing the execution of the compromise agreement of September 30th, and accepting the sewers, recording the yea and nay votes thereon.

(4) That said council on July 23, 1904, passed the resolution reciting the objections made to the sewers and directing notice thereof, and of demand on the contractors, 'that unless they appeared upon said work with all necessary material and help within ten days from date of service of notice on them and began the work of completing said sewer . . . making said sewer in all respects fully comply with the said plans and specifications on the present grade as now laid, and push the work to completion with all reasonable speed, and with due diligence, said city of Emmetsburg will consider said contract abandoned by said contractors, and will enter upon said work and complete in all respects in accordance with said plans and specifications and said contract at the expense of said Shepherd & Hanrahan, and recover the costs and expense of the work from Shepherd & Hanrahan or from those who are responsible for the performance of the contract.' That the yeas and nays were taken on this resolution.

(5) That such notice was issued as directed in the resolution and served on Shepherd & Hanrahan and B. O. Hanger.

(6) That said council passed the resolution accepting said sewers and directing the issuance of the special assessment certificates September 30, 1904.

(7) That the certificates for the amount of which recovery is sought in this action were issued and delivered in pursuance of the resolution.

(8) That the defendant herein filed an answer in the suit of the Valley National Bank for the money de-

posited by Hanger under the compromise contract of September 30th as alleged in the petition herein.

(9) That suit was compromised as alleged, the defendant therein receiving and appropriating \$600 of said sum.

(10) The defendant never offered to place the parties affected in statu quo, or to surrender any benefit received.

(11) The city attempted to perform the contracts on its part as alleged.

(12) The defendant never undertook in its corporate capacity to repudiate or rescind the contracts with Shepherd & Hanrahan, under which the sewers were constructed.

The trial court's conclusions of law may be thus summarized:

(1) The contracts are void for the irregularities found as facts, except as to proceedings since June 15, 1903, as to which latter there can be no recovery, because of failure to show separate amount thereof.

(2) That there is no liability as for tort, because there was no duty which could have been violated.

(3) The facts do not constitute an estoppel, or afford a basis upon which to predicate liability.

There was a judgment for the defendant on the merits, and plaintiff appeals. There is no real controversy over the facts stated in the petition. Many of them are admitted in the answer, and those not admitted were proved. The questions for our determination are therefore legal only, and these we will discuss, so far as we consider discussion necessary, in the order of presentation by appellant's counsel.

Appellant contends that the contracts were not originally void; that, as to the additional laterals, the court found that a resolution of necessity was adopted October 15, 1903, and notice given to contractors, inviting bids, and thereafter the letting of the contract for these laterals for \$1,833.80; that as to the main sewer it was found that an attempt was made by the city council to pass a resolu-

tion of necessity June 15, 1903, but there was a failure to call and record the yeas and nays; that at the same meeting three lateral sewers were ordered for which no resolution of necessity was ever passed, or notice of intention to pass one given; that subsequently notice to bidders for the construction of such main and lateral sewers was published, but was defective as found in the opinion of the *Bennett* case, *supra*; and that the contract for the main and lateral sewers first ordered was let to Shepherd & Hanrahan for the gross sum of \$18,192.66. And, based on the above facts, appellant says that the preliminary proceedings by the city council were sufficient to confer jurisdiction to execute the contract under the special assessment statute. Appellant says that any holding to the contrary in *Bennett v. City of Emmetsburg*, *supra*, has been overruled in later decisions by this court, and that, in any event, the decision in the *Bennett* case is not controlling here. Appellant further contends that the facts create an estoppel against the right of the city to dispute the validity of the contract; that they were not *ultra vires*, but were within the powers granted to the city, and in their execution the city was exercising its business powers as distinguished from governmental power, and that in respect to its business power a municipality is subject to the same application of the doctrine of estoppel as an individual or corporation; that by reason of the facts the city conclusively ratified the contracts for sewer construction, and waived the right to object thereto; that the facts show a clear case of compromise, accord, and satisfaction as binding upon the city as would have been the case if it were an individual or private corporation, and appellant also says there was an election of remedies on the part of the city, which now concludes it.

At the threshold of the several propositions lies the question of the power of the city to enter into contracts of this kind. If it had the power to construct sewers and to contract therefor, irregularities in the exercise of such

power will not in this case relieve the city from liability.

Had the city such power? Section 695 of the Code makes cities and towns bodies corporate, and gives them general power to contract and be contracted with, and to sue and be sued, and to exercise the inherent and implied powers of such corporations. This is a general grant of power, and our attention has not been called to, nor have we been able to find, any statute with reference to the letting of contracts for public improvements to be paid for by special assessment of the cost thereof to property benefited, which in terms or by necessary implication limits the power conferred in the general grant prior to the enactment of the special assessment statute. Sections 791, 794, 796, 810, 817, and 819 of the Code give cities the power to construct sewers and to assess the cost thereof upon the property benefited, or to pay such cost from a sewer district or from the general fund, as the city may elect. It is apparent, therefore, that cities are authorized by the statute itself to make contracts for the construction of sewers, where the cost thereof is to be paid from a general fund and not from special assessments, and the contracts thus authorized must, we think, relate to the business powers of the city as distinguished from its governmental powers. It seems to be correctly held generally that a city has two classes of powers, which have been stated as follows:

A city has two classes of power—the one legislative, public, governmental, in the exercise of which it is the sovereignty and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class, it is governed by the rule here invoked. In their exercise it is ruling its people, and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class, it is

controlled by no such rule, because it is acting and contracting for the private benefit of itself and inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation.

*Illinois Trust & Savings Bank v. City of Arkansas*, 76 Fed. 721 (22 C. C. A. 171, 34 L. R. A. 518); *Southern Bell Telephone Company v. City of Mobile* (C. C.) 162 Fed. 523; *City of Winona v. Botzet*, 169 Fed. 322 (94 C. C. A. 563, 23 L. R. A. (N. S.) 204). The dual character of municipal corporations has already been distinctly recognized by this court, and we have in effect, at least, directly adopted the rule stated in the quotation from the *Illinois Savings Bank* case. *State v. Barker*, 116 Iowa, 96, and cases there cited. But the last-cited case does not stand alone among our decisions as a recognition of the rule.

In *Marion Waterworks Co. v. City of Marion*, 121 Iowa, 321, the action was to recover for hydrant rentals in accordance with the terms of a contract, which, before being fully performed, was wholly void, because the question as to whether or not it should be entered into was not submitted to the vote of the people as required by law. We held there, as we do here, that the city had the power to make the contract, and held that, having such power, though it was defectively exercised, the city was liable for benefits received.

And in many other cases we have recognized and enforced the rule by holding that corporations of this kind can not escape liability on a plea of *ultra vires*, where the contract has been fully performed, and the defendant corporation has received the benefit thereof. *Kagy v. Ind. Dist.*, 117 Iowa, 694; *City of Ida Grove v. Ida Grove Armory Company*, 146 Iowa, 690; *Thompson v. Lambert*, 44 Iowa, 248; *McPherson v. Foster*, 43 Iowa, 48. Whatever

may have been the rights of property owners who were specially assessed for this improvement, we think it clear that the city should be held to the same business integrity that the law requires of any other corporation, or of an individual, and that the rules of estoppel and waiver should be applied to their business dealings as completely and as effectively as to other business transactions. There is, in our opinion, no legal reason, and there certainly is no moral one, whereby a municipal corporation should be permitted to reap the benefit of a fully completed contract and escape liability therefor under the plea of *ultra vires*, where the power exists to contract, but the same has been exercised in a negligent manner and even so irregularly as to release noncontracting parties from liability. That a city may be estopped under such circumstances is well settled by our own decisions. See cases cited above and *Turner v. Cruzen*, 70 Iowa, 202; *Spencer v. Andrews*, 82 Iowa, 14; *Duetzmann v. Kuntze*, 147 Iowa, 158; *Bellows v. Dist. Twp.*, 70 Iowa, 320; *Scofield & Cavin v. Council Bluffs*, 68 Iowa, 695.

Under the facts and the authorities already cited, there was a complete ratification of the contracts for sewer construction, and a waiver of the right to object thereto.

Furthermore, it is conclusively shown that there was a compromise and an accord and satisfaction, and this was as binding on the defendant city as would have been the case had plaintiff been dealing with a private corporation or individual. *Collins v. Welsh*, 58 Iowa, 72; *Allen v. Cerro Gordo County*, 34 Iowa, 54; *Grimes v. Hamilton*, 37 Iowa, 290; *Mills County v. B. & M. R. R. Co.*, 47 Iowa, 66. The city having become bound by the sewer contracts, as herein indicated, the plaintiff was entitled to judgment for the unpaid balance due on the contracts being the amount of the unpaid and unwaived certificates of special assessment in plaintiff's hands. *Scofield & Cavin v. City of Council Bluffs*,

3. SAME:  
accord and  
satisfaction.

*supra*; *Ft. Dodge E. L. & P. Co. v. City of Ft. Dodge*, 115 Iowa, 573.

Appellee's contention that there was an adjudication in the *Bennett* case that binds the plaintiff in this case can not be sustained. No question between the city and its codefendants was raised or determined in that case. The holding there was simply that the cost of the sewer could not be taxed against the property of the plaintiffs in that case. It is doubtful even if such determination would be an adjudication in favor of other property owners against the enforcement of the special assessments. It certainly could not be conclusive in their favor, unless the facts were substantially alike, and even then it has been held that a judgment for the property owner against the validity of an assessment is not *in rem*, and therefore not conclusive in another action against the city in which the validity of the same assessment roll is involved. *Trimmer v. City of Rochester*, 130 N. Y. 401 (29 N. E. 746); *Tifft v. City of Buffalo*, 164 N. Y. 605 (58 N. E. 1093). As we have already said, the fact that property may not be liable to a special assessment does not necessarily determine the liability of the city for a completed and retained improvement. The very fact that the property is not so liable creates liability on the part of the city; and, if the city is estopped by its acts to plead *ultra vires* as to an executed contract, it is clear that it can not claim that a judgment in favor of the property owner is also a judgment in its favor. The authorities relied upon by the appellee do not announce such a doctrine and are not determinative of the question. Here, the city joined with the other defendants in the *Bennett* case in resisting the plaintiff's claim, and pleaded, among other things, that a judgment sustaining Bennett's claim would render it liable; hence there was no issue between the city and its codefendants in that case that adjudicated the present controversy.

4. JUDGMENTS:  
former  
adjudication.



Some other points are argued by both the appellant and the appellee, but, as the propositions already discussed reach and dispose of the substantial merits of the case, we need go no further.

For the reasons pointed out, the judgment of the district court is reversed, and the cause is remanded for a judgment in harmony with this opinion.

*Reversed and Remanded.*

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R. E. STEPHENS, Appellant, v. LENORA V. BOYD, Appellee.

**Real property: EASEMENTS: COMMON STAIRWAY.** Where the owner  
1 of adjoining lots constructs buildings thereon, and practically on the division line of the lots builds a single stairway to the second story for the accommodation of both buildings, which was essential to both and constantly used by the occupants of the buildings for a long series of years, a conveyance of the lots to separate grantees carried with it an easement or the right of each purchaser to use the common stairway. And in an action for the enforcement of that right it was necessary for the plaintiff to show a way of necessity.

**Same: ESTOPPEL.** Although plaintiff may have 'unadvisedly admitted  
2 that he had no conveyance of the adjoining lots, still as the admission was in no manner acted upon by defendant, and plaintiff very soon thereafter sought legal advice, and upon learning his rights instituted suit to restrain defendant from removing the stairway, he was not estopped by the admission to claim the right to use the easement; nor was the same conclusive against him on the merits of the case.

**Same: FORMER ADJUDICATION.** Where the plaintiff in an action to  
3 enjoin the removal of a common stairway was not a party to a proceeding to sell the adjoining lot for the payment of the owner's debts after his death, and the right to use the stairway was not involved in that proceeding, the judgment entered therein was not an adjudication of his rights in the easement.

**Same: CONVEYANCES: TITLE.** Where testator's daughter, to whom  
4 he had both conveyed and devised property, the title not to vest until the death of testator, conveyed the same prior to his death and her grantee immediately recorded his deed, the title passed



to her grantee by virtue of her deed immediately upon the death of the testator.

**Administrator's sale:** GOOD FAITH PURCHASER. The purchaser at an administrator's sale for the payment of debts takes only such title as the deceased had; he is not entitled to protection as a purchaser in good faith.

*Appeal from Jackson District Court.*—HON. L. J. HORAN, Judge.

THURSDAY, NOVEMBER 14, 1912.

SUIT in equity to enjoin defendant from tearing out a stairway which is used in common for adjoining buildings. The trial court dismissed the petition, and plaintiff appeals.—*Reversed and remanded.*

*W. C. Gregory*, for appellant.

*Keck & Keck* and *F. D. Kelsey*, for appellees.

DEEMER, J.—Plaintiff and defendant are the owners of adjoining buildings situated on lots 3 and 4, in block 19, in the city of Maquoketa, Iowa. These are inside lots fronting on the main street in said city, and there is no alley to the rear of plaintiff's lot 3. The two lots were originally owned and improved by one John E. Goodenow, now deceased, and plaintiff obtained title to his lot through one Mrs. H. C. Tinker. Mrs. Tinker obtained her title from her father, John E. Goodenow, in the manner hereinafter stated. Defendant obtained her title to lot 4 through one B. D. Ely; the latter obtaining his title in virtue of a sale of the property by the executor of the estate of John E. Goodenow, deceased, for the purpose of paying claims against his estate. In the year 1857 Goodenow erected a brick building upon lot 4, and on the inside of the north wall of the building, which was placed approximately upon

the boundary line between lots 3 and 4, he built a stairway something like two feet and ten inches in width, running to the upper story of the building. This stairway was constantly in use from that time down until the commencement of this suit. In the year 1873 Goodenow erected a brick building on lot 3, and, in order to obtain access to the second story thereof, he so planned it as to use the stairway which had been erected in the building on lot 4, cutting a hole in the partition wall near the upper landing of the stairway, and erecting some steps leading from this landing on to the second floor of the building on lot 3. During the time that Goodenow owned the two lots, this stairway was constantly and continuously used as a means of ingress and egress to the second stories of the two buildings. A temporary stairway at the rear of the buildings was constructed and used for a while, but this was torn down because it was thought to be unsafe. So long as these buildings were owned by Goodenow, no question arose, of course, as to the ownership of this stairway, or as to whether or not it was an appurtenance to lot 3. But, when he parted with his title to the separate lots and the ownership became several, the question of ownership and the nature of that ownership became vital. As already stated, plaintiff became the owner of the lot by deed from Mrs. H. C. Tinker. This deed was one of bargain and sale, without covenants of warranty, and was executed on November 12, 1909. It described the property as lot 3 in block 19, but in the habendum clause the appurtenances were covered by the stereotyped clause usually found in instruments of that character. Plaintiff immediately went into possession under this deed, and continued to use the stairway in question by himself or tenants without objection or protest down to near the time of the commencement of this suit. Mrs. Tinker obtained her title either by the will of her father, John E. Goodenow, or through a deed from him bearing date November 15, 1901. This latter deed

was not actually delivered to the grantee until some time after the death of Goodenow, which occurred on September 3, 1902. This deed which was one with full covenants of warranty was deposited, by the maker with his will, with some attorneys in the city of Maquoketa, to be held until the death of Goodenow, and then delivered to the grantee therein named. As a matter of fact the deed was not actually delivered until some time in the year 1910, when it was filed for record, and is now one of the muniments of title. Goodenow's will makes the following reference to this deed:

2. I give and bequeath to my beloved daughter, Mrs. H. C. Tinker, living in Chicago, Ill., the following premises situated in Jackson Co., Iowa, to wit: Lot No. 3, Blk. 19, in the city of Maquoketa, Iowa, according to Perrin's survey, of 1873. . . .

8. I have made and executed jointly with my wife a deed to the property given to my last named children, signed by myself and my wife, which deeds are to be left with my will and upon our death as aforesaid, my executor, D. H. Anderson, named shall hand to each of the persons therein named, a deed of the portion of property I intended for them.

Said deed I executed and duly acknowledged on the 15th day of November, 1901.

After the death of Goodenow, his executor made application to the probate court for authority to sell lot 4 for the purpose of paying claims against the estate, and Mrs. Tinker was made a party to that application, and was properly served with notice thereof. This application was made some time in the year 1904, and, after a hearing was granted and pursuant thereto, the property was sold to B. D. Ely, and a deed of date of March 21 was executed and delivered to him. This deed described lot 4 by metes and bounds, and fixes the north boundary as the center of the brick wall between the two buildings. Mrs. Tinker made no appearance to the application, and the order of sale was

made upon an application to sell lot 4 for the payment of debts. So far, there is no dispute over the facts, and upon the record so made, plaintiff has at least a *prima facie* case. There can be no doubt of his ownership of lot 3, and whether his title came by will or deed is largely immaterial, except as it bears upon the question of former adjudication of the matters in controversy in the proceedings to sell lot 4 to pay debts.

I. When Goodenow severed the ownership of the two lots, and conveyed the same either by will or deed to different individuals, the grantee of lot 3 took his property with an easement in lot 4 which was an appurtenance to lot 3, and lot 4 became burdened with an easement in favor of the owner of lot 3. This is hornbook law, supported by the following, among other, cases: *Marshall Ice Co. v. La Plant*, 136 Iowa, 621; *Carrigg v. Bank*, 136 Iowa, 261; *Teachout v. Duffus*, 141 Iowa, 466; *Keokuk Co. v. Weisman*, 146 Iowa, 679. And this easement passed with the grant of lot 3. *Keokuk Co. v. Weisman*, 146 Iowa, 679. See, also, *Baker v. Rice*, 56 Ohio St. 463 (47 N. E. 653); *Boland v. St. John's School*, 163 Mass. 229 (39 N. E. 1035); *Portman v. Topliff*, 138 Iowa, 19.

Appellee relies, however, upon three propositions in support of the decree of the trial court: First. She contends that the conveyance of lot 3 did not operate to transfer to the grantee an easement in lot 4, for the reason that the stairway was not essential to the use of the premises conveyed. Second. She insists and offered evidence to prove that plaintiff never made any claim to an easement in lot 4, but, on the contrary, distinctly asserted that he made no claim thereto, and that, by reason of these facts, he is estopped from claiming that any such thing exists. Third. She claims that the matter of an easement in lot 4 was adjudicated adversely to plaintiff in the proceedings

1. REAL PROPERTY:  
easements:  
common  
stairway.

brought by the administrator to sell the same to pay the debts of the deceased.

As to the first proposition, the record shows that the stairway was essential to the convenient use and enjoyment of lot 3, and we think it passed by the conveyance to Mrs. Tinker, and through her to the plaintiff.

However, it was not necessary, we think, that plaintiff show a way of necessity. His grantor had so constructed and used the two buildings as to create an easement in favor of lot 3 as soon as he destroyed the unity of title by the conveyance to his daughter. Of course, if there was another way whereby to reach the second story of the building on lot 3, that fact might, and should, be taken into consideration in determining whether or not the stairway was intended as a common entrance to the two buildings, or was simply a temporary expedient, subject to change at any time. But here there was no other available entrance to the second story from any street or alley, and it is clear to our minds that the stairway was erected to furnish that sort of entrance.

II. In support of the second proposition, defendant relies upon some declarations or admissions claimed to have been made by the plaintiff to the effect that he made no claim to the stairway. We are satisfied from  
2. SAME:  
estoppel. the record that plaintiff, who was not versed in the law, did not think he had anything more than a permissive right to use the stairway until he consulted with a lawyer just before the bringing of this suit as to his rights in the premises. He took this advice because of a threat then made by defendant to tear out the stairway, and found that he was entitled to use the same. On the same day that he brought the suit he had a conversation with the defendant, or with her husband, or both, in which he admitted that he had no conveyance to lot 4, and doubtless in an effort to induce defendant not to tear out the stairway sought to excuse his conduct by placing the responsibility

for his action upon his tenant, who he said was insisting upon the preservation of the way. But assuming for the purposes of the case that he admitted to defendant and her husband that he had no right to the stairway, as they claim he did, it yet appears that on the same day and within a few hours after the admission was made and before defendant did anything on the strength of the admission, plaintiff commenced this suit to enjoin the tearing out of the stairs. Under such circumstances, there is no estoppel, for defendant did nothing on the strength of plaintiff's admissions, and has in no manner changed her position since the admissions were made. *Byer v. Healy*, 84 Iowa, 1; *Guest v. Opera House*, 74 Iowa, 457; *Vogt v. Grinnell*, 123 Iowa, 332.

Plaintiff's admissions should doubtless be considered upon the main question as to whether or not there was an easement in lot 4, but they are not conclusive upon him. In considering them for the only purpose for which they may legitimately be used, we must also take into account the circumstances under which they were made, the knowledge that plaintiff had of his legal rights in the premises, and all the other facts in the case. The law upon the subject of easements in stairways used in common is not generally understood by laymen, and the profession is not agreed upon it. Indeed, in this very case, counsel, after seeking aid from the books, are not agreed, and it is not surprising to find that plaintiff did not know his full rights in the premises, and may have assumed that he did not own any rights in lot 4 because of his unfamiliarity with the law of easements and appurtenances to real estate. If there were any doubt as to what would pass by the conveyance, and plaintiff, after being advised as to his rights, had disclaimed any right of easement, he should be held to his disclaimer. But that is not the record here, and he clearly is not estopped.

III. Her third and final proposition that all matters

were adjudicated in the proceedings to sell the real estate of the deceased to pay debts is without merit.

3. SAME: former adjudication. Plaintiff was not a party to the proceedings to sell lot 4. He was in possession of lot 3, and his deed thereto was executed November 15, 1901.

This was before the death of Goodenow it is true, but by that deed he took whatever title his grantor Mrs. Tinker had, and, whatever her rights in the premises, these passed to plaintiff as soon as she took title to the lot.

4. SAME: conveyances: title. Testator died in September of the year 1902, and upon his death, if not before, title to lot 3 passed to his daughter, Mrs. Tinker. *Lewis v. Curnutt*, 130 Iowa, 423. The will itself was of record, and, although not probated for some time after testator's death, title, even if it passed through the will, related back to the time of testator's death. As Mrs. Tinker had already conveyed whatever interest she had to plaintiff, he, plaintiff, immediately became invested with Mrs. Tinker's title, and this related back to the time of testator's death. Plaintiff's deed was recorded, as we understand it, shortly after it was made, but, if not, title passed as between testator, his heirs, and representatives upon testator's death. Plaintiff was not made a party to the proceedings to sell lot 4 for the payment of debts, and he had no notice thereof. Notice to his grantor who had parted with all her interest in lot 3 or the easement in lot 4 was not binding upon him, and he has not until this case was brought had his day in court. This, it seems to us, is a sufficient answer to the defendant's plea of former adjudication. Aside from this, however, it appears that the application made by the executor was simply to sell lot 4 for the payment of debts, and there is no showing that any question of easement was involved in that proceeding. It is doubtful if that question could have been considered or put in issue in the proceedings to sell the real estate, and certainly plaintiff's rights could not be foreclosed in an action to which he was not a party.

A purchaser at an executor's or administrator's sale to pay debts takes nothing more than the title held by the deceased. He is not entitled to protection as a good faith purchaser, although there may be cases where equity will give him some relief, and, as a rule, he can not rely upon a warranty either express or implied. *Summer v. Williams*, 8 Mass. 162, (5 Am. Dec. 83); and cases cited in 18 Cyc. 826 and 827. Even were this not so, he is bound to take notice of all those things which would charge an ordinary purchaser. Here plaintiff was in the possession and use of the property, and of the stairway, and this in itself would be notice to any prospective purchaser of his rights. There was no adjudication binding upon plaintiff. We are satisfied from the whole record that plaintiff is entitled to the relief asked, and that the trial court was in error denying it.

The decree will, therefore, be reversed, and the cause remanded for one in harmony with this opinion.

*Reversed and remanded.*

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E. A. BOYL, Appellee, v. MIDLAND LYCEUM BUREAU,  
Appellant.

**Contracts:** EVIDENCE IN EXPLANATION OF AMBIGUITY. Where a contract is not intelligible to an ordinary person without the aid of extrinsic evidence, a letter written by one of the parties at the time of making the contract, purporting to be an interpretation of its meaning in some essential particular, was admissible in explanation of the ambiguity. In the instant case the letter in connection with the interpretation of the contract by the mutual acts of the parties is held to show that plaintiff was entitled to pay for one hundred lecture engagements as the minimum guaranteed number.

**Same:** BREACH: DAMAGES. Under a contract that a lecturer should receive no pay for an engagement which he failed to fill, the bureau was not entitled to damages because of such a failure, and for which he made no charge.



*Appeal from Polk District Court.*—HON. HUGH BRENNAN,  
Judge.

THURSDAY, NOVEMBER 14, 1912.

ACTION upon a contract for services as a lecturer. There was a counterclaim for a breach of the contract. Verdict and judgment for plaintiff, and defendant appeals. —*Affirmed.*

*S. B. Allen*, for appellant.

*A. W. Brett*, for appellee.

EVANS, J.—The defendant appellant is a lecture bureau. The plaintiff was one of its lecturers for a period of five years. The contract between the parties was entered into in January, 1905. The headquarters of the bureau were in Des Moines. The residence of the plaintiff was Camden, N. Y. After some oral negotiations, a written contract was formulated at the home office and forwarded to the plaintiff, and was duly executed by both parties. Such contract was as follows:

Contract. By and between Midland Lyceum Bureau, Des Moines, Iowa, party of the first part, and Elliott A. Boyl, of Camden, New York, party of the second part, witnesseth: That said party of the first part does hereby agree to engage and does engage said second party for as much time as they may be able to use during the season beginning in October, 1905, in the capacity of lecturer. Limited to ———. Said first party agrees to pay said second party for said services the sum of seventy (\$70.00) dollars per week (payable weekly), and all expenses; said expenses to mean railroad fares, necessary drives, bus and baggage transfers, hotel bills, beginning at Camden, New York, and ending at last date; credential rebates for clergy rate (if secured) to belong to said first party. First party agrees to furnish printing except 2,000 advance enamel

circulars and plates, cuts and designs for circulars and hangers. Witnesseth: That said second party does hereby agree to fill all bookings made for him on the dates assigned, and to report on Monday of each week, on blanks furnished by first party, the collections and disbursements (including his own salary) of the previous week up to and including Sunday, and to remit, with report, by draft or money order, the balance on hand. Said second party agrees to give six nights per week to the work, if so many should be required, and to take drives, night trains, and to endure other hardships where necessary. Second party agrees to follow railroad schedules furnished by first party and to depart from same only at his own risk, except in cases where a change of train time-tables shall render the schedules furnished first party inoperative; in which case he shall spare no effort to reach his date by any other route, or a long drive, if necessary. Second party agrees to pay all his expenses not named above, and to furnish or pay for 2,000 advance enamel circulars and plates, cuts and designs for circulars and hangers. Second party agrees to give first party exclusive control of his time from October 1, 1905, to October 1, 1906, and to give first party option on his time from October 1, 1906, to October 1, 1907, at \$85.00 per week, same terms as above; also from October 1, 1907, to October 1, 1908, at \$100.00 per week, same terms as above. Second party agrees to avoid making trouble at hotels or with committees or managers, the express understanding of this paragraph being that he shall be polite, agreeable and obliging at all times and endeavor to please both on and off the platform. (Second party also agrees that first party may cancel this contract for incompatibility, ill health, misconduct or unsatisfactory work) and where loss is sustained or rebates must be made to any committee because of his failure to please, said second party shall receive no salary for said engagement. It is mutually agreed that 'open dates' shall be borne by first party, but in any event no salary shall be paid when two or more engagements are missed due to blockades, washouts, epidemics, or other troubles where blame attaches to neither party, though first party shall pay all expenses of second party during that time; also any agreement by first party to take consecutive time does not apply to any time open between

December 15 and January 15, unless first party chooses to book said time, nor to any other period of one or more weeks in which no bookings occur, provided first party fills the guaranteed number of nights (or weeks), if any are guaranteed, between October 1 and May 1, of the season specified. It is also agreed that second party shall collect, report, and remit as agent of the first party, and as such is liable for all funds passing through his hands. It is also mutually agreed (that first party shall also have option on time of second party from October 1, 1908, to October 1, 1910, at \$100.00 per week, same terms as above. Also that second party shall be sold in a circuit as a regular circuit number).

At the time such contract was forwarded to the plaintiff for his signature, it was accompanied by the following letter known in the record as Exhibit B.

Des Moines, Iowa, Jan. 14, 1905. Mr. Elliott A. Boyl, Camden, New York—Dear Mr. Boyl: We inclose contract made out for five years as per our agreement with you when I saw you. Will see what we can do with Waterloo and other assemblies and do all we can for you. I just returned home the 12th. I wish to reiterate our statement that our seasons do not run less than 100 nights. The only guarantee that you need along this line is our agreement to sell you as regular circuit number which we are willing to do. The only possibility of running less would come in case of an utter destruction of the Midland Bureau due to hard times or some great national calamity which would swamp us. We think you will see the absurdity of such a supposition and will understand as the rest of our talent understands that the agreement to put you in a regular circuit is equivalent to guaranteeing you 100 nights or more. We have talked over the matter of your doing agency work in Ohio and we are more than anxious to have you attempt it, feeling sure that you can make money and at very little risk of loss to yourself. Will make you a proposition along that line in a very short time. Best regards.

I. The plaintiff entered upon the performance of the contract and continued for four successive years, concern-

ing which no controversy is presented. The defendant also exercised its option to demand the plaintiff's services for the fifth season beginning October, 1909. For that season, the defendant furnished the plaintiff seventy-eight engagements. It is the contention of plaintiff that under the contract he was entitled to a minimum limit of one hundred engagements. He brought this suit to recover compensation for the additional twenty-two nights claimed by him. It is the contention of defendant that it was bound to use plaintiff only for such engagements as it could secure, and not more, and that it could not secure more engagements for him than it did do for the last season, and that it terminated his contract on March 25, 1910. In support of his contention, the plaintiff introduced in evidence over the objection of defendant the letter (Exhibit B). He contends that it was a part of the written contract, or, at least, that it was an accepted interpretation thereof. The defendant contends that it was no part of the contract, and that it should not have been admitted in evidence, and the points relied on for reversal concentrate upon this letter.

Turning now to the contract which is known in the record as Exhibit A and to the letter Exhibit B, we find them entirely consistent. Looking at the contract Exhibit A alone, it would not be intelligible to an ordinary person without the aid of extrinsic interpretation. The contract refers to a "guaranteed number of nights," but does not specify the number. It also contains the words "limited to ———." It also provides for an option to the defendant on the time of plaintiff "from October, 1908, to October 1st, 1910, at \$100 per week same terms as above." It also provides that the plaintiff "shall be sold in a circuit as a regular circuit number." It also gives the defendant the exclusive control of the time of the plaintiff for the entire period covered at a stated compensation per week. Exhibit B only purports to be an interpretation of Exhibit A as

1. CONTRACTS:  
evidence in  
explanation  
of ambiguity.

to what is meant by selling the plaintiff "as a regular circuit number." It is there stated that this "is equivalent to guaranteeing you one hundred nights or more." The proviso of Exhibit A thus interpreted does not on its face convey any definite meaning. It was clearly proper that the parties put an interpretation upon it. For four seasons the defendant furnished plaintiff one hundred engagements or more, except for the second season. For such season the engagements actually furnished were somewhat less than one hundred, but the plaintiff was compensated precisely as though the one hundred engagements had been furnished. We have then the written interpretation agreed on in advance of performance, and a subsequent interpretation by the mutual acts of the parties in the course of performance, from both of which it appears that the plaintiff was to receive a minimum wage as for one hundred engagements. We hold, therefore, that Exhibit B was clearly admissible. It is immaterial for the purpose of this case whether it should be deemed as a part of the contract or simply as an interpretation of its ambiguity. The real meaning of the terms used in Exhibit A could only be ascertained by resort to Exhibit B.

The appellant has specified a large number of points relied on for reversal, all of which bear directly upon the question now considered. Our conclusion thereon is quite decisive against the appellant upon the whole case.

II. By way of counterclaim, the defendant pleaded damages for breach of contract. Two items were claimed. One of them was conceded and presents no controversy.

2. SAME: breach: damages. The other was an item for damages resulting to the defendant by reason of plaintiff's failure to fill a date at Alma, Neb. It is claimed that the failure resulted in damage to the defendant to the amount of \$162. We can find no evidence in the record to show that plaintiff's failure to make the date at Alma, Neb., resulted through any fault of his own. Be that as it may,

the contract especially provides that, "where a loss is sustained," . . . "said second party shall receive no salary for said engagement." The plaintiff received no salary for the Alma engagement, and claimed none. He therefore met the full requirements of the contract in that regard.

The judgment below must be—*Affirmed*.

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DAVID F. HOLLY, Appellant, v. RICHARD HOLLY, Appellee.

**Guardianship:** APPOINTMENT IN VACATION. A judge of the court has  
1 authority under the statute to appoint a temporary guardian for an insane person, or an habitual drunkard incapable of managing his affairs; and the judge making the appointment may treat a subsequent application to annul the same, though addressed to the court, as an application to him as judge to be determined in vacation; as the mere setting aside of a temporary appointment is in no manner a trial on its merits for the appointment of a permanent guardian.

**Same:** VACATION OF TEMPORARY APPOINTMENT. Section 3222, provid-  
2 ing that at any time not less than six months after the appointment, the person under guardianship may apply to the court or judge for a termination of the same, has reference to a permanent guardianship and not a temporary appointment; the latter appointment granted on an *ex parte* application may be set aside at any time.

**Same:** JURISDICTION: RESIDENCE. The evidence is reviewed and held  
3 to show that the ward for whom it was sought to have a guardian appointed was not a resident of the county in which the proceeding was pending, and the finding of the trial court to that effect was conclusive on appeal.

**Same.** A guardianship proceeding is *in personam*, and the court has  
4 no jurisdiction over an incompetent who is a resident of another county, and has no property within its jurisdiction for which it is essential that a guardian be appointed; and the mere fact that some person in the county held money belonging to the ward will not confer jurisdiction.

**Same:** CHANGE OF PLACE OF TRIAL. A guardianship proceeding is a  
5 special proceeding, to which the statute relating to the removal of a cause to the county of defendant's residence is not applicable.

*Appeal from Cherokee District Court.*—HON. JOHN F. OLIVER, Judge.

THURSDAY, NOVEMBER 14, 1912.

IN a proceeding instituted in the district court of Cherokee county by a petition filed by the plaintiff, asking the appointment of a guardian for the defendant alleged to be incompetent to manage his affairs and addicted to the excessive use of intoxicating liquors, the judge of said court appointed Wm. Mulvaney temporary guardian for the defendant. On an application to set aside this appointment and cancel the letters issued on the ground that the defendant was, and for many years had been, an actual inhabitant and resident of Dubuque county, and not an inhabitant or resident of the county in which the proceeding was instituted, the judge, having considered affidavits in support of the application and in resistance thereto, found that the defendant was an inhabitant and resident of Dubuque county, and that in making the appointment the judge was without jurisdiction to do so and thereupon ordered that the appointment of Mulvaney, as temporary guardian, be canceled and annulled. The plaintiff appeals from this order.—*Affirmed.*

*Wm. Mulvaney*, for appellant.

*Walter P. McCulla and Kenline & Roedell*, for appellee.

McCLAIN, C. J.—The appointment of the temporary guardian for the defendant was made on plaintiff's application without any trial or final determination of the question whether, in fact, the defendant was a resident of the county of Cherokee in such sense as to authorize the appointment by the judge of a permanent guardian for him.

The ruling of the judge which is now complained of simply terminated the temporary guardianship, and presented no obstacle to the trial by the court of the question whether the defendant was, in fact a resident of the county, and was in fact so far incompetent as to justify the appointment of a permanent guardian for him. No issue, either of law or fact, was raised in the lower court on plaintiff's petition, so far as the appointment of a permanent guardian was applied for. It is true that the judge, in sustaining the application for the discharge of the temporary guardianship, announced his reason for doing so to be that the defendant was a resident of Dubuque county, and not of Cherokee county; but that conclusion was predicated wholly upon affidavits, and was not a finding in the final determination of the case. The plaintiff could have secured an adjudication on the allegations of his petition relating to the necessity for a permanent guardian, involving, of course, the question as to the residence of the defendant; but he did not see fit to do so. He has appealed only from the order discharging the temporary guardianship.

I. Under the provision of Code, section 3220, relating to an application for the appointment of a permanent guardian of the property of a person who is of unsound mind or an habitual drunkard incapable of managing his affairs, the judge of the court in which the proceeding was instituted may appoint a temporary guardian, and the appointment of Wm. Mulvaney as temporary guardian of the estate of the defendant was made by the judge of the court in pursuance of this authority. Thereupon the defendant asked the court to annul and set aside such appointment, presenting affidavits tending to show that the defendant was a resident of Dubuque county. This application was presented, however, in vacation to the judge of the court who had made the preliminary order, and said judge directed a hearing before him on affidavits of such application.

1. GUARDIANSHIP:  
appointment  
in vacation.



• Although the application was addressed to the court, we have no doubt that the judge to whom it was presented was justified in construing it to be an application to him for an order such as is authorized by Code, sections 3831, 3846, to be determined in vacation. However this may be, no objection was made to him, nor is any objection now made, that he improperly placed such construction upon the application. The plaintiff appeared at the time designated, and presented counter affidavits as he was authorized to do by the court's order, and submitted to the determination of the judge the question whether the appointment of a temporary guardian should be set aside. It is plain that there was no attempt to secure a trial on the merits of the application for a permanent guardian and that no such determination was made.

It is not contended for appellant that the judge has not the authority in vacation to entertain an application to set aside the appointment of a temporary guardian made by him on a preliminary *ex parte* showing.

Such a determination is not a trial of the case on the merits of the plaintiff's petition for the appointment of a permanent guardian and the provisions of Code, section 3220, that either party may have a trial by jury in such a case has evidently no reference to the appointment by the judge of a temporary guardian or his action in dissolving such temporary guardianship.

II. The provision of Code, section 3222, that "at any time, not less than six months after the appointment of such guardian, the person under guardianship may ap-

2. SAME:  
vacation of  
temporary  
appointment.

ply to the court, or any judge thereof," for an order terminating the guardianship, evidently has reference to a permanent guardianship, and not to one which is temporary in its nature and only to continue until the propriety of appointing a permanent guardian can be decided in the method provided by law. There is nothing in the statutory provisions to war-

rant the inference that a temporary guardianship granted on an *ex parte* application can not be set aside until after the expiration of six months. Neither the appointment nor the discharge of a temporary guardian has any bearing upon the trial of the question whether a permanent guardian should be appointed.

III. Counsel for appellant assail the order of the judge discharging the temporary guardianship on the ground that the finding in the order from which they appeal

3. SAME:  
jurisdiction:  
residence.

that defendant was a resident of Dubuque county and that the court to which application for the appointment of the guardian for the defendant was made was without jurisdiction, was erroneous; and, inasmuch as this question is discussed in argument on both sides, it may, we think, be properly considered.

Treating the finding of the judge as an adjudication by the court on the question of its jurisdiction, it is sufficient to say that on affidavits presented on each side the judge may very well have found as a conclusion of fact that the defendant was at the time the proceeding was instituted not an inhabitant or resident of Cherokee county, but, on the other hand, that he was and had been for at least ten years an inhabitant and resident of Dubuque county. It appears without substantial controversy that about ten years before this proceeding was instituted the defendant, a man without family, left Cherokee county, and went to Dubuque county, where he voluntarily became an inmate of St. Antony's Home for the Aged under an arrangement by which he was to remain at said Home for life, paying \$3 per week for his board. His competency to effect a change of residence and enter into such an arrangement is not questioned in this proceeding, and, so far as appears from the record, has never been questioned. Since becoming an inmate of the Home defendant has voted in Dubuque county and remained in that county, save for

temporary visits to Cherokee county; one of those visits being on the occasion of the funeral of his sister. It does not appear that on this or any other occasion of his visiting Cherokee county after becoming an inmate of the Home, he assumed or pretended to be a resident of that county, or that he did anything to indicate an intention to return to that county for residence. Under the showing, the trial judge could not very well have found otherwise than, as he did, that the defendant was not an inhabitant nor a resident of Cherokee county. In a law case the finding of the trial court or judge is as conclusive on us with reference to the facts as would be the verdict of a jury.

If the defendant was not an inhabitant nor a resident of Cherokee county, but, on the other hand, was an inhabitant and resident of Dubuque county, then the court had

4. SAME. no jurisdiction to entertain the proceeding for the appointment of a permanent guardian for him. The proceeding is not *in rem*, but it is *in personam*. *Brown v. Lambe*, 119 Iowa, 404. In the case before us there is no pretence that there was property of the defendant within the jurisdiction of the court as to the management or disposition of which it was essential that a guardian be appointed. It was alleged that defendant had property in Cherokee county, consisting of money which he was incompetent to manage; but even this allegation was not supported by any showing that there was any sum of money belonging to the defendant in Cherokee county or in the custody of any person living in said county, and no effort whatever was made to bring any money or other property of the defendant within the jurisdiction of the court. The mere fact that some persons in Cherokee county held money belonging to the defendant would not in itself give the court of that county jurisdiction to appoint a permanent guardian for his property.

It is suggested that the lower court acquired jurisdiction, and that the remedy of the defendant, if the proceed-

ing was instituted in the wrong county, was to move for its transfer to the county of his residence.

5. SAME: change of place of trial.

It is plain, however, that the provisions of Code, section 3504, relating to change of place of trial in case an action is brought in the wrong county, are applicable only to actions and not to special proceedings, such as those for the appointment of a guardian. If such a proceeding is instituted in a court having no authority to entertain it, no jurisdiction is conferred, and the court must necessarily dismiss it:

The order discharging the temporary guardian is therefore—*Affirmed*.

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FARDAL DRAINAGE DISTRICT No. 72, in HAMILTON COUNTY, IOWA, VARICK CROSLY, Appellant, v. THE BOARD OF SUPERVISORS OF HAMILTON COUNTY and Others, Appellants.

**Drainage: EQUALITY OF ASSESSMENT: APPORTIONMENT OF COST.** The  
1 drainage law requires that there shall be equality in the assessment of lands so far as possible and that those receiving the greater benefit shall bear the greater burden; but the manner of equitably apportioning the cost, expenses and damages is left to the commissioners, and they may charge certain lands specially benefited by some feature of the work with a certain part of the cost, in addition to their proportion of the general expense.

**Same: CHANGE IN PLAN OF CONSTRUCTION.** Slight but unimportant  
2 changes in the original plan of drainage, the cost of which is wholly paid by those landowners benefited, is not ground for objection by an owner not affected thereby.

*Appeal from Hamilton District Court.*—HON. ROBERT M. WRIGHT, Judge.

SATURDAY, NOVEMBER 16, 1912.

THE facts are stated in the opinion.—*Affirmed*.

*Wesley Martin*, for appellant.

*J. M. Blake*, for appellee.

SHERWIN, J.—The Fardal drainage district No. 72 is located in Freedom township, Hamilton county. The water is carried away by an open ditch, which extends north about four and one-half miles from its outlet, and by three lines of tile extending north from the head of the open ditch. The plaintiff is the owner of the S. W.  $\frac{1}{4}$  of section 8, township 88, range 26, which land is within the drainage district. One Welch owns the S.  $\frac{1}{2}$  of section 5, W. A. Jones owns the S. E.  $\frac{1}{4}$  of section 6, and J. W. Smith owns the E.  $\frac{1}{2}$  of section 7, and in the same township and range. One line of tile runs north from the upper end of the open ditch and enters the plaintiff's land near the southwest corner thereof, and extends north across his quarter section some two or three rods east of the west line thereof, and then north into the Welch land in section 5. The benefits assessed to the plaintiff's land were as follows: The N. E.  $\frac{1}{4}$  of his 160, containing twenty-four acres, was assessed \$81.88; the S. E.  $\frac{1}{4}$ , thirty-eight acres, \$70.84; the S. W.  $\frac{1}{4}$ , thirty-eight acres, \$436.08; and the N. W.  $\frac{1}{4}$ , containing thirty-nine acres, was assessed \$599.88. Plaintiff filed objections to the assessment on the grounds that there was an improper and illegal classification of his land, and because the assessment was excessive, inequitable, and greater than assessments made against other land within the district. The board of supervisors confirmed the assessments, as we understand the record, and the plaintiff appealed to the district court, where the assessment on each of the west forties was reduced \$50, and the action of the board was otherwise confirmed. Each party was ordered to pay one-half of the costs, and the plaintiff appeals.

I. The record shows that the cost of the main tile, in what is termed the "tile area." was taxed wholly to that

area, and not spread over the whole district, and that the entire district was then taxed for the general benefit. The appellant contends, first, that the tile area should not have been alone taxed for the cost of tiling, but that it should have been spread over the whole district; and, second, that if the cost of the tile should be paid by the tile area alone, then there should have been two assessments, one for the cost of the general improvement, and the other for the cost of the tile. The Drainage Law requires equality in these assessments, so far as the same may be attained by human endeavor. Section 1989-a12, Code Supp. But it does not undertake to specify just how such equality shall be determined. It provides only that the commissioners appointed for the purpose shall make an equitable apportionment of the "costs, expenses, costs of construction, fees and damages assessed for the construction of any such improvement." The main purpose of the law is to secure an equitable apportionment of the entire cost of the improvement, after considering the location of the several tracts of land, their condition and needs, and the relative benefit that each tract will receive from the improvement as a whole. As we have said, the method of reaching this result is not specifically pointed out in detail by the statute. All that is required is that the lands receiving the most benefit from the improvement shall bear the greater burden. Under this statute, we believe it to be entirely within the power of the commissioners to make any classification, in addition to that specifically required by the statute, which will aid them in finally accomplishing the end sought, to wit, an equitable apportionment. If they find that such an apportionment requires them to tax certain lands a certain part of the cost of the improvement in addition to a just proportion of the general cost, we see nothing in the law to prevent such action. Indeed, we think the statute requires

1. DRAINAGE:  
equality of  
assessment:  
apportionment  
of cost.

that very thing to be done where an equitable apportionment demands it.

The whole controversy, then, hinges on the question whether there had been, in fact, an equitable apportionment. Practically all of the evidence in the case touching the question of taxing the cost of the tile to the tile area alone agrees that it should be done. Even the engineers used as witnesses by the plaintiff, with one exception, agree that such a method is right, and, in fact, the only right method to secure an equitable apportionment. The reasons they and the defendants' engineers and other witnesses give for this conclusion appear to us to be sound, and we are not disposed to hold that they are all wrong on the question. The question then remains whether the plaintiff has, in fact, been charged more than his just proportion of the cost of this improvement. The testimony is in sharp conflict on this branch of the case. The matter was investigated by the board of supervisors, at least some of the members having visited the district in person, and determined adversely to the plaintiff. The district court gave the case careful attention, and made but a slight reduction in the amount assessed to the plaintiff. We have gone over the evidence with care, and reach the conclusion that the decree of the district court does not require the plaintiff to pay more than his equitable proportion of the cost of the improvement. It is an utter impossibility to determine to a nicety what any particular assessment should be. The most that can be done is to arrive at a result that will fairly meet the requirements of the statute, and such, we think, is the case here.

II. What we have already said is sufficient answer to the appellant's contention that a subdistrict should have been established under the provisions of section 1989-a23.

III. It is claimed that there was such a variation from the route of the main open ditch, as originally established, as to render a part, at least, of the assessment void.

The original plan provided for an angular and crooked open ditch, and it was slightly changed in two or three places in its construction, but such changes are shown to have been unimportant, and that the additional expense occasioned thereby was paid wholly by those for whose benefit such changes were made. The plaintiff has no just ground for complaining of this.

2. SAME: change in plan of construction.

IV. The court had authority to make a division of the costs, and the division made was favorable to the plaintiff. The judgment is—*Affirmed*.

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CHARLES L. KENNIS v. THE OGDEN COAL CO., Appellant.

**Mines and mining: NEGLIGENCE: EVIDENCE.** In this action for injury to plaintiff by the falling of slate from the roof of a mine, while occupying an opening between two parallel entries constructed primarily for the circulation of air, the evidence is held to require submission of defendant's negligence in failing to support the opening.

**Same: INSTRUCTIONS.** Where there was evidence that it was customary for miners to use the "crosscut" or opening between two parallel entries for keeping their tools and eating their lunches, and that there was no rule of the company forbidding such use, refusal of an instruction that if plaintiff was charged with knowledge of company rules excluding miners from using the opening, repeated violations of such rule would not justify plaintiff in assuming the risk involved in its use, was proper. And under the evidence the court rightly instructed that if it was customary for miners to thus use the opening, and this custom was acquiesced in by defendant, it became its duty to keep the walls in a reasonably safe condition and to make reasonably frequent inspection thereof, and that failure of defendant in this respect would render it liable, was properly given.

**Same: ASSUMPTION OF RISK: INSTRUCTIONS.** An employee is bound to exercise the prudence of a reasonably careful person; but where there was no issue as to the capacity and intelligence of the plaintiff, an instruction that an employee assumed the dangers and risks of an employment which an ordinary person of



his capacity and intelligence would have known and appreciated in his situation, could not have been prejudicial to defendant.

**New trial: MISCONDUCT IN ARGUMENT.** The fact that counsel for 4 plaintiff in argument urged the jury to award the most liberal verdict permissible under the prayer of the petition, leaving its possibly excessive character to the court and counsel, and also in suggesting the inference that he had a personal interest in a large verdict and that some party other than the defendant might be liable therefor, such for instance as an insurance company, was not such prejudicial conduct as to require reversal, where the court admonished counsel during his argument to keep within the evidence, which admonition was heeded, and in his instructions expressly cautioned the jury against accepting counsel's interpretation of the evidence and that they had nothing to do with his personal interest in plaintiff's case.

*Appeal from Boone District Court.*—HON. ROBERT M. WRIGHT, Judge.

SATURDAY, NOVEMBER 16, 1912.

ACTION to recover damages for personal injuries received by plaintiff while employed in the defendant's mine, alleged to have been due to the negligence of defendant. There was a verdict and judgment for plaintiff and defendant appeals.—*Affirmed.*

*Dyer & Dyer and John A. Hull, for appellant.*

*D. G. Baker, for appellee.*

McCLAIN, C. J.—The plaintiff, an experienced coal miner, while eating his dinner in the mine, sitting on a loose tie at the intersection of an entry and a "crosscut," so called, was injured by a fall of slate from the roof. The alleged negligence of the defendant, rendering it liable to plaintiff for damages on account of the injuries received, consisted in the failure to properly investigate the roof of the mine at the place where the plaintiff was injured so as

to discover the dangerous condition of the same and in failing to timber the roof at that place. In addition to a general denial, the defendant pleaded contributory negligence of plaintiff and an assumption by him of the risk incident to the conditions which surrounded him at the time of the alleged injury.

I. The general contention for appellant that, on its motion at the close of the evidence, the court should have directed a verdict for the defendant, and that the verdict as rendered should have been set aside as unsupported by the evidence, is predicated upon various grounds which can be understood only by a brief statement of the uncontroverted facts.

I. MINES AND  
MINING:  
negligence:  
evidence.

In defendant's mine the coal is taken out in accordance with what is called the "panel" system, involving the extension into the vein of two parallel entries from thirty to forty feet apart connected by a "crosscut" or "break-through" intended primarily to cause a circulation of air at the working face of the vein. As the entries are carried forward in the process of mining and rooms are turned off from them, a new "cut-through" is made about every sixty feet, and the one previously constructed is closed up with "gobb" so as to force the air to pass through the last one. Plaintiff was at work mining at the end of entry "G," which was being extended in a westerly direction parallel to entry "H" and about thirty-seven feet beyond the last "crosscut," which is designated as No. 3. But during the forenoon of the day of the accident he had suspended his work about 9 o'clock in order to interview the pit boss in regard to the supply of air, being one of the miners' committee charged in their interest with looking after the relations between the miners and the mine management. Before returning to his work, he and another miner, named Anderson, had seated themselves at the intersection of "crosscut" No. 3 and entry "G" to eat their dinners, and

while so engaged the fall of slate occurred, which injured the plaintiff.

With reference to this state of facts, the general contention of appellant is: That the "crosscut" was constructed and used for the circulation of air only; that it was not the custom in the defendant's mine or in the mining district in which the same was located to timber such "crosscuts;" that plaintiff knew of the custom in this respect and the conditions under which he was working in the mine, and continued in the employment without protest or complaint; that the roof of entry "G" and of "crosscut" No. 3 was in good condition, and, if inspected, would have appeared to be without defect on the morning preceding the accident; and that the fall of slate which caused the injury to plaintiff was in the "crosscut" or "cut-through," and not in the entry, so that, had plaintiff been sitting fully within the limits of the entry, he would not have been injured. In short, the contention is that plaintiff was injured by reason of placing himself fully or partly in the "cut-through" where he had no right to be, and where defendant was under no obligation to protect him from the danger of a falling of slate from the roof, and that plaintiff was charged with knowledge of this fact by reason of his experience, and placed himself in this position of danger for his personal convenience, and not in pursuance of any duty or requirement of his employment.

Without setting out the evidence in detail, it is sufficient to say, in answer to this general contention for the appellant, that there was evidence tending to show that it was the custom of miners, known to defendant, to eat their dinners in the mine at such places as they might select; that the "cut-throughs" were generally used by the miners as proper places in which to put their dinner pails and leave their tools and as proper ways through which to pass from one entry to another if there was any occasion to do so, either in the ordinary prosecution of their work or in cases

of emergency; and that the defendant had assumed, with reference to the entries and "cut-throughs," the duty of maintaining them in a safe condition and preventing the falling of the roof therein by props when necessary. There was also evidence tending to show that the portion of the roof about the intersections of "cut-through" No. 3 with entry "G," which injured plaintiff, was not wholly in the "cut-through," but extended into the entry so that, although plaintiff might have been wholly within the limits of the entry, he would have been injured by the falling of that portion of the roof which was within such limits. If, therefore, the jury was properly instructed, there was no error of which appellant can complain in refusing to direct a verdict for the defendant or in refusing to set aside the verdict as rendered.

II. With reference to the instructions, there are many assignments of error in refusing to give those asked for the  
2. SAME:                      appellant and in the giving of those which  
instructions.                were submitted by the court to the jury.  
Many of these can be sufficiently disposed of by reference to the general theory on which the case was submitted.

Complaint is made of the refusal of an instruction that, if plaintiff was charged with knowledge of the rules of the company excluding miners from the use of the "crosscuts" by them, repeated violations of such rules would not justify him in the assumption of the risk involved in such use; and the giving of an instruction to the effect that, if it was customary for the miners to use such "crosscuts" for storage of tools and as a place to sit while eating their dinners, or for other convenient uses, and that this custom was acquiesced in by defendant, it was the duty of the defendant to keep the walls and roof of "crosscut" No. 3 in a reasonably safe condition and make reasonably frequent and proper inspection thereof, and that a failure or neglect of defendant in this respect would render it liable. It has already been indicated that there was evidence tend-

ing to show that a custom of miners, acquiesced in by defendant, was to use "crosscuts" for the purposes stated, and that there was no rule of the company brought to their attention forbidding such use. The instruction given properly submitted to the jury the considerations which they should take into account under the evidence in determining whether the use of the "crosscuts" by the miners was proper, and there was no error in refusing to give the instruction asked upon that subject.

In one instruction given the jury was told that an employee assumes the risks and dangers of the employment which he knows and appreciates, and also assumes those which an ordinarily prudent person of his capacity and intelligence would have known and appreciated in his situation. Error is assigned in limiting the assumption of the risks of the employment to those which an ordinarily prudent person "of his capacity and intelligence would have known and appreciated in his situation." If there had been an issue under the pleadings or evidence with reference to the capacity and intelligence of the plaintiff, there might have been some force in this criticism, for, of course, the employee is bound to exercise the prudence of a reasonably careful person; at any rate, he is bound to do so unless the employer is charged with some knowledge of his lack of ordinary capacity and intelligence. But there was no such question in the case. The plaintiff is presumed to have had ordinary capacity and intelligence, and there is not the slightest suggestion in the record to the contrary. The expression criticised, if it could be construed to have had reference to the peculiar capacity and intelligence of the plaintiff, was wholly without prejudice, for the jury could not be presumed to have based their verdict upon any lack of such capacity and intelligence on plaintiff's part. But in the connection in which the expression is used, it clearly had reference to the general capacity and intelligence which

3. SAME:  
assumption  
of risk:  
instructions.

must be presumed to have been possessed by an employee in the general employment in which plaintiff was engaged, and, under this construction of the language, it was not prejudicial as a matter of law. Taking the instruction as a whole, we are satisfied that it contains no erroneous statement of the law as applied to the evidence, and that, if read with the other instructions on the subject, it correctly informed the jury as to the considerations which they should take into account in determining the assumption of risk. The other objections made to the instructions are so evidently without merit, under the facts and circumstances with reference to which they were given, that a discussion of them would be superfluous.

We find nothing in the instructions of which appellant can reasonably complain, and the instructions asked and refused, so far as they suggest the proper rules of law applicable to the case, are fully covered by those given.

III. It is earnestly contended for the appellant that the record presents an aggravated case of misconduct by counsel for the appellee in his opening argument to the jury, and that on account of such misconduct the verdict should have been set aside. In brief, the complaint is that counsel for appellee urged the jury to put the amount of their verdict up to what the jurors should think it ought to be within the prayer of the petition—leaving to him the responsibility of settling afterwards with the court the question whether it was excessive—and in leading the jury to infer that he had some personal interest by way of a contingent fee, and further that there might be some party other than the defendant, such for instance as an insurance company, which might have to pay the judgment rendered. We would hardly be justified in setting out in full the portions of the argument of counsel which are presented in the record in order to show the connection and significance of the particular portions of which complaint is made. The portions

4. NEW TRIAL:  
misconduct in  
argument.

of the argument presented in the record would not serve as a model for the use of other counsel in similar cases. But it appears that in the course of the argument, and in response to objections made by counsel for appellant, the court warned counsel for appellee to confine himself in argument to the evidence and the questions properly before the jury for consideration, and that these admonitions were, as given, heeded by counsel to whom they were addressed. In its instructions the court cautioned the jurors against accepting the interpretations which might be put by counsel in their zeal upon the evidence of the witnesses, and expressly told them that they had nothing to do with the interest of the attorney for plaintiff in the case.

After reading with care the argument for plaintiff, so far as it is presented in the record, we are satisfied that, in view of the cautions suggested during the argument and in the instructions, there was nothing so calculated to prejudice or unduly influence the jury as to require the trial court to set aside the verdict. We are reluctant always to interfere with the action of the trial court in its conclusion, based upon the entire trial of the case as it has proceeded before it, that no improper prejudice or influence has affected the verdict as rendered, and in this case we see no occasion for such interference.

The judgment of the trial court is therefore—*Affirmed.*

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ARCELLUS SYKES v. THE PURE FOOD CIDER COMPANY, W.  
A. CLINITE, President, W. A. CLINITE, M. C. AL-  
BROOK, Appellants.

**Corporations: SALE OF STOCK: STATUTES: FALSE REPRESENTATIONS.**

- 1 Under the present statutes relating to incorporation and requiring payment in cash for all stock issued, unless the executive council shall grant leave to accept property in payment therefor, and the filing of a verified statement of the amount issued, date, etc., the issuance of stock is a representation by the subscribing offi-

cers that the corporation had received its par value, and will support an action to recover money paid for stock in reliance upon the representation.

**Same:** FRAUDULENT ISSUANCE OF STOCK: LIABILITY OF OFFICERS. From 2 the authentication and issuance of corporate stock knowing that it contained false statements, it will be inferred that the officers acted with intent to defraud, not only purchasers dealing directly with them for the stock, but all who purchase the same in reliance upon the representations contained therein and who are damaged thereby.

*Appeal from Polk District Court.*—HON. WILLIAM H. McHENRY, Judge.

SATURDAY, NOVEMBER 16, 1912.

ACTION for the purchase price of capital stock illegally issued resulted in judgment as prayed. The defendants appeal.—*Affirmed.*

*John C. De Mar and Sullivan & Sullivan*, for appellants.

*W. C. Strock*, for appellee.

LADD, J.—On the 27th day of April, 1909, E. H. Lundy sold the property, business, and good will of the Pure Food Cider Company, located at Eldora, in the name of which he appears to have been engaged in the manufacture and sale of certain soft drinks, to M. G. Albroom and W. A. Clinite for a consideration designated \$8,000; each undertaking to pay one-half of this sum. The negotiations were through Albroom, and articles of incorporation, previously prepared by him, were signed by the purchasers. These fixed the capital stock at \$20,000, divided in shares of \$100 each, reciting that “eighty shares shall be fully paid up at the time of the commencement of business;” that the principal place of business “shall be at the city



of Des Moines;" that until the first meeting of stockholders Clinite shall be president and treasurer and Albroom vice-president and secretary of the corporation; and that these shall constitute the board of directors with the privilege of electing another stockholder as director at any time. Thereupon certificates of shares of capital stock, signed by Clinite as president and Albroom as secretary, were issued, eighty shares to each, and on each certificate was printed these words: "One hundred percent of the face value of this certificate has been paid for to the company in cash." But not a dollar had been so paid, nor had leave been obtained from or granted by the executive council of the state to issue capital stock in consideration of property. Bogus checks were signed by Clinite at Albroom's suggestion, and passed through the bank where the company did business to so "balance" its account as to indicate that cash had reached the bank to the company's credit in an amount equal to the stock issued. About fifteen or twenty days later, Arcellus Sykes, a farmer from Ida county, who had moved to Des Moines, in looking for an investment, was informed by a stockholder that he thought Clinite would sell some of this stock, and knew Albroom would. He called on Clinite, who informed him that none of his stock was for sale, but said that Albroom might sell some, and stated to him that \$16,000 in stock had been issued, all of which was fully paid and equally divided between himself and Albroom, and that the company had been incorporated. In pursuance of an arrangement then made, Sykes returned in the evening when Albroom was present and the latter, in the presence of Clinite, repeated substantially what Clinite had said. Sykes saw Albroom several times in the next three days, and was shown the articles of incorporation, and told by him that chapter 71, Acts 32d Gen. Assem., had been complied with; and, when asked by Sykes whether the \$16,000 in stock represented the consideration paid Lundy, answered "the purchase price and

money and equipment put in" since the purchase, that the bank books would show that this amount had been put in the business, and he made out this statement as indicating the property of the company:

Mdse. & Fixt. ....	\$ 1,700
Dispensaries .....	4,200
Accts. ....	7,324
New business .....	3,500
Bk. balance .....	500
	<hr/>
	\$17,224
Indebt. ....	\$ 200

Thereupon Sykes bought of him twenty shares at par, though without knowledge of the effects of the company other than as furnished in this statement, and, as he testified, in reliance on the representation that the stock was fully paid, and the corporation duly organized June 2, 1909, was elected a director and manager of the company. He testified that in doing so he relied on Clinite's statement that the company was incorporated under the laws of Iowa, and there was \$16,000 of paid-up capital. The twenty shares of stock were first assigned to Sykes by Albroom, but later new certificates with same recital thereon were issued in their stead. The property of the company was moved to Des Moines, and the business there conducted until some time in July of the same year, when Sykes discovered the truth concerning its affairs and severed his relations therewith.

The property went into the hands of a receiver and less than enough to satisfy its indebtedness was realized therefrom. In this action Sykes seeks to recover the \$2,000 paid for the stock with interest thereon from May 21, 1909, because of fraud alleged to have been practiced on him, and for that

1. CORPORATIONS:  
sale of stock:  
statutes: false  
representa-  
tions.

the laws were not complied with in organizing the company or in issuing the stock.

The statute, in so far as material, may be set out:

Section 1. That from and after the passage of this act no corporation organized under the laws of the state of Iowa, except building and loan associations as defined and provided for in chapter thirteen (13) title (9) of the Code, shall issue any stock or any certificate or certificates of shares of capital stock, or any substitute therefor, until the corporation has received the par value thereof. If it is proposed to pay for said capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing capital stock in any form, apply to the executive council of the state of Iowa for leave so to do. Such application shall state the amount of capital stock proposed to be issued for a consideration other than money, and set forth specifically the property or other thing to be received in payment for such stock. Thereupon, it shall be the duty of the executive council to make investigation, under such rules as it may prescribe, and to ascertain the real value of the property or other thing which the corporation is to receive for the stock; and shall enter its finding, fixing the value at which the corporation may receive the same in payment for capital stock; and no corporation shall issue capital stock for the said property or thing in a greater amount than the value so fixed and determined by the executive council.

Sec. 2. It shall be the duty of every corporation to file a certificate under oath with the Secretary of State, within ten (10) days after the issuance of any capital stock, stating the date of issue, the amount issued, the sum received therefor, if payment be made in money, or the property or thing taken, if such be the method of payment.

Sec. 5. Any officer, agent or representative of a corporation who violates any of the provisions hereof shall, upon conviction, be fined not less than two hundred (\$200) dollars nor more than one thousand (\$1,000) dollars, and be imprisoned in the county jail for not less than thirty (30) days nor more than six (6) months.

Chapter 71, Acts 32d G. A., as amended by section 4, chapter 104, Acts 33d G. A.

From the recital of facts it will be observed that the defendant and Albrook violated the above statutes in three respects: (1) In issuing certificates of capital stock before the company had received the par value thereof; (2) in issuing capital stock solely for property without first having applied to the executive council of the state for leave to do so, and without having obtained such leave, with the value of the property ascertained at which the corporation might receive the same in payment for the capital stock; and (3) in not filing a certificate with the Secretary of State within ten days after the issuance of the stock.

Under the last section of the act, each of these constitute a misdemeanor punishable by fine and imprisonment, and, of course, in the respects pointed out the officers of the company were negligent. But the action is not founded on negligence, and could not well be. *Warfield v. Clark*, 118 Iowa, 69. It is for deceit alleged to have been practiced by the defendant. That he represented the shares of stock to have been fully paid in cash, that this was false, and so known to him was fully established. Indeed, the mere issuance of certificates of stock since the enactment of chapter 71 of the Acts of the Thirty-Second General Assembly was a representation that the corporation had received par value therefor as exacted therein.

Moreover, in signing the certificates of shares, reciting that payment had been made in cash, and in participating in issuing the same, he specifically so represented. That

2. SAME: fraudulent issuance of stock: liability of officers.

he knew that payment had not been so made, that not to exceed \$8,000 had been paid for the property before the organization of the corporation, and that no appraisement thereof had been made by or at the instance of the executive council, although certificates of paid-up stock amounting to \$16,000 was issued is not disputed. From these facts it is to be inferred that he acted with intent to defraud. *Hanson v. Kline*, 136 Iowa, 101; *Nash v. Minnesota Title Ins. Co.*,

163 Mass. 574 (40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. Rep. 489).

Had plaintiff purchased the shares of stock from defendant, then there could have been no doubt as to the liability of the latter. In authenticating and issuing the certificates of stock, the defendant in connection with Albrook, as officers of the company, made the representations contained therein and implied from their issuance, "which, like the offer of a letter of credit, addressed themselves to whoever should purchase these certificates thereafter whoever he might be." *Windram v. French*, 151 Mass. 547 (24 N. E. 914, 8 L. R. A. 750); *Bruff v. Mali*, 36 N. Y. 200; *First Nat. Bank v. Lanier*, 11 Wall. 369 (20 L. Ed. 172); *Stickel v. Atwood*, 25 R. I. 456 (56 Atl. 687). Although neither in form or character negotiable instruments, stock certificates are readily transferable, and are bought and sold in the open market like other securities, and a corporation and its officers in issuing them are not only responsible to the persons dealing directly with them, but to all who deal with the stock in reliance on the representations made. It may be that defendant did not profit thereby, but this was not necessary to render him liable. His liability is predicated upon his wrongful act and the consequent injury to plaintiff. 14 Am. & Eng. Ency. of Law (2d Ed.) 153; *Nash v. Minnesota Title Ins. Co.*, *supra*; *Stickel v. Atwood*, *supra*.

The damage to plaintiff in the loss of money paid to Albrook for the shares of stock was a direct consequence of the fraudulent representations in which the latter and defendant participated in issuing the certificates, and we are unable to discover any avenue by which he may escape liability.

The verdict for the amount prayed was rightly directed, and judgment entered thereon.—*Affirmed*.

C. M. HARADON V. DR. MILTON G. SLOAN, Appellant.

**Physicians: MALPRACTICE: INSTRUCTIONS: DAMAGES.** In an action  
1 for malpractice the instruction that the plaintiff had the burden  
of proving by a preponderance of the evidence that the defendant  
did not treat plaintiff with medical skill and care, that such failure  
to exercise reasonable and ordinary skill resulted in the injury  
complained of, that the injury complained of was due solely to  
the lack of ordinary skill and care, and that plaintiff was not  
guilty of contributory negligence, was not objectionable as au-  
thorizing recovery without proof of damages.

**Same: CONTRIBUTORY NEGLIGENCE: INSTRUCTIONS.** Where there was  
2 no evidence whatever to authorize a finding that plaintiff in an  
action for malpractice was negligent, an instruction authorizing  
recovery if defendant did not use ordinary skill, though ignoring  
the question of contributory negligence, while incorrect was not  
prejudicial and did not require a reversal of the case.

**Same: PHYSICIANS: MEASURE OF SKILL.** The skill required of a  
3 physician or surgeon is that ordinarily exercised by the profes-  
sion as a whole, and not that exercised by those of a particular  
locality. But in the instant case there was no evidence to show  
that the skill of physicians in the community was greater than  
that exercised by those of similar communities, and the instruc-  
tion fixing the measure of skill by that exercised in the same  
community or neighborhood was not prejudicial.

**Evidence: HYPOTHETICAL INQUIRIES: INSTRUCTIONS.** Although the  
4 court failed to instruct that the value of expert evidence based  
wholly upon hypothetical inquiries depends upon the proof of  
the facts assumed, still in this instance the instruction was cor-  
rect so far as it went, and in the absence of request for some-  
thing more specific was sufficient.

*Appeal from Polk District Court.*—HON. HUGH BRENNAN,  
Judge.

SATURDAY, NOVEMBER 16, 1912.

SUIT to recover damages for malpractice. There was

a verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

*Wade, Dutcher & Davis, and Parsons & Mills, for appellant.*

*Bannister & Cox and R. B. Alberson, for appellee.*

SHERWIN, J.—In May, 1910, the plaintiff's left leg was broken between the ankle and knee by a heavy iron pipe that rolled onto his foot and struck his leg. Soon thereafter the appellant was called and took charge of the case. The plaintiff was taken to his home by appellant, and the necessary preliminary matters attended to that day. The next morning the appellant put the leg in a fracture box, where it remained for about two weeks, for the purpose of reducing the swelling sufficiently to permit a reduction of the break. When the leg was taken from the fracture box, the swelling was entirely gone, and the appellant then placed it in a plaster cast, where it remained undisturbed for about three weeks. The appellant then removed a part of the cast and found a discoloration of the skin, which he successfully treated. The entire cast was removed about four weeks later, or about seven weeks after the leg was broken. There is a conflict in the evidence as to whether the break was a transverse or comminuted one. The appellant testified that both tibia and fibula had a comminuted fracture, and in this he was corroborated by Dr. Huston, who assisted appellant in placing the leg in the cast. On the other hand, an X-ray examination of the break, after the cast had been removed, showed that the bones had been broken transversely, and such was the opinion of medical men who testified for the plaintiff. There was also evidence tending to show that the appellant, at the time of the injury, told the plaintiff that it was a square break, and that he told plaintiff's brother the next morning, after

placing the leg in the fracture box, that it was a "clean, straight break." When the plaintiff's leg was taken from the cast, it was crooked. It was some two inches shorter than it was before it was broken; and it is practically undisputed that the ends of the large bone, the tibia, were neither aligned nor in apposition, but were overlapped from one to two inches. Overlapping as they do, the bones cannot unite to form a good union and make a good leg. The best that nature can do under such conditions is to form what the doctors term a "fibrous union," which all agree is not as good as a union of the bones, and which the evidence tends to show makes the leg practically useless.

I. No. 1 of the court's instructions is as follows: "The burden of proof is upon the plaintiff; and in order that he may recover in this case he must prove, by a preponderance of the evidence, the following:

I. PHYSICIANS:  
malpractice:  
instructions:  
damages.

First. That defendant did not, with medical skill and care, properly treat plaintiff for his ailment. Second. That such failure to so treat plaintiff with reasonable and ordinary skill, as defined in these instructions, resulted in the injury complained of. Third. That said alleged injury is due to the lack of ordinary skill and care, and not otherwise. Fourth. That the plaintiff was not guilty of negligence contributing to such injury. And a failure to so establish any of these matters requires that the jury shall find a verdict for the defendant." Complaint is made of this, because it did not require the plaintiff to prove that he was damaged in any amount, but left that for the jury to infer. The complaint is without merit. The instruction did not authorize a recovery without proof of damages, and in a subsequent instruction the court fully covered the question of damages.

II. Instruction 7, given by the court, is as follows, so far as the same is material to our present discussion: "If you find from the evidence that the defendant did not use ordinary skill and diligence in the treatment of the



plaintiff's leg, and that his failure to use such skill and diligence resulted in the increased injury complained of, you will, in that case, find for the plaintiff." The quoted part of the instruction is assailed, because it wholly ignored the question of the plaintiff's contributory negligence, and was in conflict with instructions 1 and 5, which told the jury that plaintiff must prove that he was not guilty of contributory negligence. It was error to give the instruction under consideration. *Lauer v. Banning*, 140 Iowa, 319; *Quinn v. Railway Co.*, 107 Iowa, 711; *Thayer v. Smoky Hollow Coal Co.*, 121 Iowa, 121; *Christy v. Railway Co.*, 126 Iowa, 432.

But it does not necessarily follow that the error was prejudicial to the appellant; and, of course, if it was not there should be no reversal on account thereof. We have examined the record in this case with great care for the express purpose of ascertaining whether it contains any evidence tending, in the least, to show that the plaintiff is chargeable with any act that contributed to the injury complained of, and we have been unable to find any evidence upon which a jury or a court could predicate a finding that the plaintiff was negligent. He did not try to use this leg until urged by the appellant to do so, and then his use of it seems to have been in strict accord with appellant's instructions. The appellant himself testified that the use that plaintiff first made of his leg after the cast was removed "did not make it materially worse at all." It is apparent, therefore, that there was no question of contributory negligence to go to the jury, and that the appellant suffered no prejudice on account of this instruction.

III. There is no merit in appellant's contention that the court did not confine the jury to a consideration of the negligence charged. The instructions, read as a whole, clearly state the plaintiff's case and limit the consideration to such case.

IV. In the second instruction the court told the jury that appellant's skill was to be measured by that of "good physicians and surgeons of ordinary ability and skill practicing in similar localities," and then, in the same instruction, he said that if appellant omitted to use the "ordinary skill and diligence of his profession . . . in this locality" he might be liable. In other instructions he fixed the measure of skill by that of physicians of "this community" and in the "same neighborhood." Complaint is made of the use of these latter expressions. They are inaccurate, and did not give the jury the correct rule. *Whitesell v. Hill*, 101 Iowa, 629; *Decatur v. Simpson*, 115 Iowa, 348. But the appellant could not possibly have been prejudiced by the language used. In the first place, there is nothing in the record tending to show that the general professional skill of Des Moines is greater than that of their brethren in localities similar to Des Moines; and, unless such an inference can be drawn, no prejudice could result. In the second place, the setting of a broken leg, where the break is between the ankle and knee, is a simple matter, and one that does not require extraordinary skill. Every little town in the state has from one to a half dozen physicians, who are fully qualified to set fractures of this kind. See *Whitesell v. Hill*, *supra*; *Kline v. Nicholson*, 151 Iowa, 710.

V. Instruction 7 is further criticised, because it permitted the jury to speculate as to plaintiff's future pain and suffering, and because it did not point out the elements of plaintiff's damages. Both criticisms are without merit.

VI. Appellant insists that the following part of an instruction is erroneous:

In this case a number of witnesses have been called and testified as medical experts; that is, they have given you their opinion, based upon hypothetical questions put to them. You will carefully consider this testimony and give

it the weight you think it justly entitled to, taking into consideration the amount of skill and learning possessed by such experts; also their candor or want of candor upon the witness stand, or the interest manifested by them, if any, in the result of the suit. But while it is proper for you to consider this class of evidence and give it such weight as you may think it justly entitled to, still you are not bound to find the facts to be as they have been testified; but you should consider their evidence and all other evidence in the case, and then give it such weight and credit as you may think it entitled to receive. The value of such testimony depends upon the circumstances of each case, and of these circumstances the jury must be the judge. When expert witnesses testify to matters of fact, from personal knowledge, then their testimony as to such facts within their personal knowledge should be considered the same as of any other witnesses who testify from personal knowledge.

This instruction did not tell the jury that the value of opinion evidence, based wholly on hypothetical questions, depended upon the establishment of the facts assumed; but, as far as the instruction went, we think it correct and in line with the following decisions: *Spiers v. Hendershott*, 142 Iowa, 446; *Ball v. Skinner*, 134 Iowa, 298; *Morrow v. Association*, 125 Iowa, 633; *Borland v. Walrath*, 33 Iowa, 130; *Whitaker v. Parker*, 42 Iowa, 585. If the appellant desired further instructions, he should have asked for them. The case was fairly covered by the court, and nothing further can be claimed, in the absence of specific requests.

We can not agree with the appellant's contention that there was a total failure to show negligence on his part, and that there should have been a directed verdict in his favor. In our opinion, the verdict is amply supported by the facts appearing in the record. We find no error for which there should be a reversal, and the judgment is therefore—*Affirmed*.

**WACKERBARTH & BLAMER Co., Appellant, v. THE INDEPENDENT SCHOOL DISTRICT OF INDEPENDENCE, IOWA, JOHN T. BARNETT, Treasurer of said District, GEORGE A. NETCOTT, W. E. BAIN, Appellees.**

**School buildings: SUBCONTRACTORS' CLAIMS: FILING OF SAME.** Under  
1 the statute relating to the filing of claims by subcontractors for material furnished for the construction of any public building, bridge or other improvement not belonging to the state, the filing of a claim with the treasurer of a school district, and service of notice thereof on the president and secretary of the board, is in compliance with the provision of the statute requiring that it shall be filed with the officer through whom payment is to be made.

**Same: INSOLVENCY OF PRINCIPAL CONTRACTOR: EFFECT.** While the  
2 statute above referred to does not create a lien in favor of a subcontractor it does offer him an equitable right to the unpaid funds in the hands of the corporation; and upon compliance with the statute in filing his claim a personal liability is created against the corporation, to the extent of the funds in its hands, which can not be defeated by a general assignment by the principal contractor for the benefit of creditors, although previously made.

**Same: EFFECT OF ASSIGNMENT BY CONTRACTOR.** The general assign-  
3 ment for the benefit of creditors by a contractor for public work before its completion, does not amount to an assignment of the fund for construction of the work in the hands of the corporation; the assignee takes only a right of action therefor.

**Same: STATUTE: PREFERENCE.** The statute giving subcontractors a  
4 claim against public corporations provides for a preference which the courts can not ignore, even though distribution of the funds in the hands of the corporation under a general assignment by the principal contractor would be more equitable.

*Appeal from Buchanan District Court.—HON. F. C. PLATT, Judge.*

MONDAY, NOVEMBER 18, 1912.

THE defendant Netcott is a principal contractor, who entered into contract with the defendant school district for the erection of a schoolhouse. The plaintiff is a subcontractor, who furnished Netcott over \$6,000 worth of lumber and material for the construction of such public building. As such subcontractor the plaintiff brought this action against the school district under the provisions of section 3102 of the Code; the defendant Netcott being insolvent and having failed to finish the contract. Upon trial in the district court, the plaintiff's petition was dismissed, and it appeals.—*Reversed and remanded.*

*Cook & Cook*, for appellant.

*Hasner & Hasner*, for school district and its treasurer.

*Chappell & Todd*, for W. E. Bain, assignee.

EVANS, J.—The case was submitted upon an agreed statement of facts. Only questions of law, therefore, are submitted for our consideration. These questions are two in number: (1) Did the plaintiff comply with the preliminary requirements of section 3102, or did he fail to file his statement of account with the proper officer of the school district? (2) Were the provisions of section 3102 available to the plaintiff after the principal contractor had made a general assignment for the benefit of his creditors?

Section 3102 is as follows:

Public Buildings or Bridges—Claim of Subcontractor. Every mechanic, laborer or other person who, as subcontractor, shall perform labor upon or furnish materials for the construction of any public building, bridge or other improvement not belonging to the state, shall have a claim against the public corporation constructing such building, bridge, or improvement for the value of such services and material, not in excess of the contract price to be paid for such building, bridge or improvement, nor shall such cor-

poration be required to pay any such claim before or in any different manner from that provided in the principal contract. Such claim shall be made by filing with the public officer through whom the payment is to be made an itemized and sworn statement of the demand, within thirty days after the performance of the last labor or the furnishing of the last of the material, and such claims shall have priority in the order which they are filed.

In attempted compliance with the requirements of this section the plaintiff filed an itemized and sworn statement of his account with the treasurer of the school district;

1. SCHOOL BUILD-  
INGS: subcon-  
tractors'  
claims: filing  
of same.

and within a few minutes thereafter, and approximately at the same time, he served a written notice of such filing upon the president and secretary of such school district.

It is urged by appellee that the treasurer was not the proper officer with whom such statement should have been filed, but that it should have been filed with the secretary as being the officer contemplated by the provisions of the quoted section. This contention is based in part upon the case of *Green Bay Lumber Co. v. Thomas*, 106 Iowa, 420. That was an action against the county. The statement was filed or left with one member of the board of supervisors. We held in that case that it should have been filed with the county auditor. This section of the statute was not at that time identical with its present form. Its requirement then was that the statement should be filed "With the officer *through whose order* the payment is to be made." It will be noted that the statute in its present form requires a filing with the "public officer through whom the *payment* is to be made." It was this provision which led the appellant to make the formal filing with the *treasurer* on the theory that he was the officer through whom payment would be made. It is argued that the change in the statute was intended only to improve its form, and not to change its real meaning, and that its meaning and intent are not there-

by changed. The argument is that the treasurer as a disbursing officer can exercise no responsibility except to pay the warrants drawn upon him, that the warrants must be drawn by the president and secretary, and that such warrants when drawn and delivered constitute payment within the meaning of the statute. The argument is not without its force. A warrant being once issued and delivered is practically beyond recall or defense; but the fact remains that the treasurer is the officer through whom the payment is made in the literal sense. It is evident, also, that, if the plaintiff had filed its statement with the *secretary* in lieu of the *treasurer* or with the *president* in lieu of either, he could not have escaped the menace of plausible argument against the course adopted. As against the secretary, it could be said that he is not the officer through whom "payment" should be made, and, further, that he is not the officer "through whose order" the payment is to be made. His duties are clerical and are performed under the direction of the board of directors in pursuance only of their official action. The order or warrant, when issued upon the direction of the board, must be signed by the president and the secretary. If it would have been sufficient to file with the *secretary* under the terms of the statute, by the same reasoning it would be sufficient to file the same with the *president*. As urged by appellees, the real purpose of the statute is very plain. It is intended to bring the claim definitely and formally to the attention of the governing officers of the corporation before its liability thereon can attach. We have already noted the fact that the plaintiff not only filed the sworn statement with the *treasurer*, but he immediately served written notice to that effect upon the *president* and the *secretary*. We think that such a course fully met the requirements of the statute and amounted to a filing of the statement with the president, secretary, and treasurer. To hold otherwise would be unduly technical, and would ignore, not only the spirit of the statute, but its

literal letter as well, in that the treasurer is an officer through whom "payment" is made.

II. We turn now to the second question. A few hours prior to the filing of the sworn statement by plaintiff and on the same day, the principal contractor, Netcott, made a general assignment for the benefit of his creditors. The plaintiff filed its claim within the thirty-day period, and complied in all respects with every requirement of the statute. It is agreed that there was in the hands of the school district, due under the contract, at the time of such filing, the net sum of \$6,168.57 over and above one prior claim of \$97. The question is, can the plaintiff be deprived of the benefits of section 3102 by the mere act of the principal contractor in transferring his claim against the school district to some other person? Does the mere fact that the principal contractor made a general assignment for his creditors prevent the plaintiff from availing himself of this statute thereafter, even though within the statutory period? Our first impressions on the oral argument inclined to the affirmative on this question. Upon further consideration we are convinced that the position is not sound. We have held heretofore that the statute creates no lien in favor of the subcontractor, although it does offer him a certain equitable right. *Whitehouse v. Surety Co.*, 117 Iowa, 328; *Green Bay Lumber Co. v. Independent School District of Odebolt*, 125 Iowa, 227; *Swearingen Lumber Co. v. School District*, 125 Iowa, 283; *Steel Co. v. Van Buren County*, 126 Iowa, 619.

In the *Swearingen* case, *supra*, we held that where the school district was garnished, and answered showing its indebtedness, and was adjudged to pay the claim of the garnishee, it was entitled to credit for the amount so paid, and was liable only for the amount remaining in its hands. And this was held notwithstanding that the subcontractor filed his claim therewith within thirty days. He had not filed his

s. SAME: insolvency of principal contractor: effect.



claim when the school district answered. It was made to appear, also, in that case that the subcontractor intervened in the garnishment action, and that the question of his priority was there litigated. It is contended for appellee that such case is authority to support the ruling of the trial court. We think it falls far short. The statute purports to create a personal liability against the public corporation. It is limited, however, to the amount due under the contract at the time such liability is created. The corporation is not bound to assume that the subcontractor will avail himself of the provisions of this statute. It is not bound to suspend operations while waiting for the expiration of thirty days in favor of any subcontractor. But, when the subcontractor does avail himself of the provisions of this section and does comply with its formal requirements, then a personal liability is created against the public corporation, to the extent of the amount of money then in its hands, preference being given to subcontractors in the order of their filing in pursuance of this statute. If we say that the principal contractor can of his own volition deprive the plaintiff of the benefits of this section by merely making a general assignment for the benefit of his creditors, then we contradict the statute, and we deny to the subcontractor the very preference which the statute offers him. If the principal contractor may thus defeat the subcontractor by making a general assignment for his creditors, by the same logic he may do so by making any *bona fide* assignment to any proper person for a proper consideration. This would be adding an exception to the statute and taking somewhat of substance away from it.

It is argued that by force of the general assignment the fund in the hands of the school district passed immediately into the possession or custody of the assignee. But this contention is not quite accurate. No title to a fund is involved. The school district was debtor to Netcott under the con-

3. SAME: effect of assignment by contractor.

tract. The general assignment carried to the assignee the possession of no fund. The principal contractor had a cause of action against his debtor and nothing more. This cause of action was acquired by the assignee by the general assignment. The right and interest of the school district as debtor was not affected. If the school district had paid to Netcott the full amount due under the contract before the subcontractor had availed himself of the provisions of section 3102, it would have been protected against a second liability under the holding in the *Swearingen* case, *supra*. If it had made such payment to the assignee under the same circumstances, it might perhaps have been protected in like manner. The provisions of the statute guard the public corporation against double liability. But there is no valid reason why it needs any protection to the extent of the amount due from it, and while such amount remains unpaid. If this is so as between it and the principal contractor, we can see no fair reason why it should not be so as between it and the assignee of the contractor. True, the amount due from the school district after the assignment is no longer due to the principal contractor, but to the assignee. But this change does not, under the terms of the statute, operate as a limitation upon the right of the subcontractor. The limitation of the liability imposed by the statute is "not in excess of the contract price to be paid for such building." The contract price and the payments thereon and the balance due form the criterion under the statute, and this regardless of whether the principal contractor has transferred his interest therein or not. The assignee took the cause of action as it was. While it was held by the contractor, it was subject to the contingency that subcontractors had a right to avail themselves of the provisions of the statute at any time before settlement had. The assignee necessarily took the cause of action subject to the same contingency.

It is urged that distribution of this insolvent estate

under the assignment would be more equitable than to permit this creditor to obtain the claimed preference. The argument appeals to us, but the statute under consideration expressly provides for preference. Of necessity a statute of preference can never operate equally in a particular case. If there ought to be no preference in such a case, the statute should be repealed. While it continues, it can not be ignored. Without this statute the principal contractor could by a general assignment divert the contract price in large part to the benefit of antecedent creditors. The statute could be rendered more equitable, perhaps, if it provided for a pro rata distribution of the unpaid price among the labor and materialmen. But it is not so written. The conclusion is unavoidable in this case that the plaintiff has brought itself within the provisions of the statute and is entitled to the preference.

Some other points are argued by appellant. Objection is made to certain credits claimed and taken by the school district; one being for \$30 for insurance and the other being for about \$200 for an old building that was taken by Netcott at such agreed price. It is sufficient to say that the points here urged were not made in the court below. A stipulation of facts was entered into, and the case was tried thereon. From this the amount of the indebtedness appears as above stated.

The judgment of the trial court must be—*Reversed* and the case *Remanded*.

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PETER WILLIAMS, Appellant, v. LIZZIE F. WILLIAMS,  
Appellee.

**Wills:** CONSTRUCTION: LIFE ESTATE. In the construction of wills, courts will look to the intent of the testator as gathered from the instrument as a whole, rather than to a comparison of particular words and phrases with those of like import used by

others under other surroundings; the ordinary canons of construction are to be followed simply as aids in determining the testator's intent.

Where the testator gave his wife a life estate and upon her death his son to become the owner of a life estate, and upon his death the property to go to the heirs of his body, and if he died without issue then to his sisters, and limited his power of alienation except for the purpose of paying legacies, the son took only a life estate; the rule of Shelley's case not being controlling.

*Appeal from Johnson District Court.*—Hon. R. P.  
HOWELL, Judge.

MONDAY, NOVEMBER 18, 1912.

ACTION to recover possession of certain real estate and to establish plaintiff's title thereto. Defendant demurred to the petition, and, this demurrer having been sustained, plaintiff elected to stand on his petition, and judgment was rendered for defendant. Plaintiff appeals.—*Affirmed.*

*Ney & Bradley*, for appellant.

*Wade, Dutcher & Davis*, for appellee.

DEEMER, J.—Plaintiff claims title to the real estate in controversy under and in virtue of the will of Peter Williams, deceased, from which we quote the following paragraphs:

Par. 1. I, Peter Williams, of the county of Johnson, state of Iowa, being of sound mind and disposing memory, do hereby make and publish this, my last will and testament, as follows, to wit: I will and bequeath to my beloved wife, Ellen M. Williams, a life interest in and to all real property of which I may die seised or possessed the same to use to her use and support, she to receive all rents, profits and emoluments, derived therefrom so long as she shall survive me, provided, however, it is my will and wish that my son, Peter Williams, shall be allowed to

rent the real estate in which my said beloved wife shall have a life interest as aforesaid, if my said beloved wife shall find and deem him a suitable and careful person to rent the same.

Par. 2. I will and bequeath that upon the death of my said beloved wife, that my said beloved son, Peter Williams, shall have and become owner in all real estate mentioned in the next preceding paragraph of a life estate therein and upon the death of my said beloved son the said property shall pass and go to the heirs of his body and become vested in them in fee simple, absolute, provided, however, should my said beloved son die without issue then the said real estate shall pass and go to his sisters, Lizzie F., Nellie H., and Jennie A., or to the survivors of them; it being my will that all of my real estate of whatever kind or nature of which I may die seised or possessed shall first be subject to the life estate or interest of my said beloved wife as provided in the first paragraph hereof, and upon her death shall pass to my beloved son, the said Peter, and that the said son shall have a life estate therein and that he shall not be privileged to mortgage or sell the said real estate or any part thereof except that he shall be allowed to mortgage the said real estate for the purpose of obtaining money with which to pay his sisters, Lizzie F., Nellie H., and Jennie A., the several sums bequeathed to them as provided in the next succeeding paragraph hereof.

Par. 3. Upon the death of my beloved wife, Ellen M., I will and bequeath that my son, the said beloved Peter Williams, shall pay to my beloved daughter, Lizzie F., the sum of twenty-five hundred dollars, and shall pay to my beloved daughter, Nellie H., the sum of two thousand dollars, and shall pay to my beloved daughter Jennie A., the sum of one thousand dollars, the said several sums bequeathed in this paragraph to be paid within one year from the death of my beloved wife, and to become a charge and lien upon all real estate left in my estate and passing into the hands of my said beloved son, Peter, as in the next preceding paragraph provided until said several sums are fully paid.

Par. 4. I will and bequeath that all the personal belongings of which I may die seised or owner or possessed, shall pass and become the property of my beloved daugh-

ters, Lizzie F., Nellie H., and Jennie A., in equal shares; it being my will that my said daughters shall take all and every kind of personal property of which I may die owner or possessed in equal shares; provided, however, I will and bequeath unto my said beloved son, Peter, all the work horses, harness, buggies, wagons and farming machinery of which I may die owner or possessed; said beloved children to become owners of the said personal property upon my death; and provided further that the piano which I may possess upon my death shall go to my beloved daughter, Jennie A.

Par. 5. I will and bequeath that my said beloved son, Peter Williams, shall pay all expenses of my last sickness and burial expenses and I will and request that my beloved daughters Lizzie F., Nellie H., and Jennie A., shall erect at their expense a monument at my grave which shall cost not less than six hundred dollars. I will and request that my beloved son, Peter Williams, shall pay the expenses of my last sickness and burial expenses of my beloved wife, Ellen M.

The argument is, that by the second paragraph of the will either under the rule in Shelley's case, or by reason of the language of the clause itself, plaintiff took an estate in fee, subject to a life estate in his mother, and that all subsequent clauses are void for repugnance or operated as a restraint upon alienation and should not be considered. For appellee it is contended that the rule of Shelley's case is not applicable to wills, or, if applicable, it is not a rule of property, but may perhaps be considered in arriving at the testator's intent, and that, in any event, the rule to be applied here is to arrive at testator's intent from an examination of the whole instrument. It is useless to enter into the field of inquiry regarding the law of this state applicable to such wills. The question was fully examined in the late case of *Westcott v. Meeker*, 144 Iowa, 311, and we there held, following the Massachusetts court, that:

The rule for the construction of wills followed by courts in recent times is to ascertain the intent of the tes-

tator from the whole instrument, attributing due weight to all its language, and then give effect to that intent unless prevented by some positive rule of law, rather than to try to make the interpretation of particular words or phrases in one instrument square with that before given to somewhat similar words used by some one else under other surroundings to accomplish a more or less different end. *McCurdy v. McCallum*, 186 Mass. 464 (72 N. E. 75). A few combinations of words have become so fixed in their meaning by long and unvarying use as to be rules of property. But ordinary canons for the interpretation of wills, having been established only as aids for determining testamentary intent, are to be followed only so far as they accomplish that purpose, and not when the result would be to defeat it.

Going back now to the will, it will be observed from a reading thereof that testator expressly limited plaintiff's estate to one for life, and put it out of his power to sell or dispose of the fee. In at least two clauses of the will testator said that he should have but a life estate, and express limitations were put upon his power of alienation. It is manifest that the devise of the remainder to the heirs of his body, and in default of issue, to others was not intended simply as a limitation, but the words creating the estate were manifestly intended as words of purchase. The rule in *Shelley's case* is not controlling, and no other rule should be recognized which will defeat testator's clearly expressed intent.

The judgment must be, and it is,—*Affirmed*.

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A. E. MAINE v. DEMETRIOS CONSTANTINE, Appellant.

**Landlord and tenant: LIEN: NOTICE: ENFORCEMENT.** Subsequent  
1 purchasers are charged with notice of a provision creating a lien for rent in a duly executed and recorded lease of property; and where the provision was definite with respect to the extent of the lien and the property to which it attached, the fact that it was in general terms and resembled the landlord's statutory  
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lien, in no manner affected its validity, or the right to enforce it in equity.

**Same: CLAIM FOR RENT:, EVIDENCE.** The evidence respecting the  
2 amount due on certain rent notes is reviewed and held to support the finding of the trial court.

**Same: WAIVER OF LIEN: FRAUD.** The execution of a new lease, with  
3 the understanding that the amount still due on the prior lease should be satisfied, is not a waiver of the lien under the original lease: Nor could fraud be inferred from the fact that plaintiff sued for more than was in fact due him.

**Same: ENFORCEMENT OF LEASE: PARTIES.** One having no interest  
4 in a lease or the enforcement of the same at the time action was instituted for that purpose was not a necessary party defendant; the maker of the lease and rent notes and the present owner of the property were the only necessary parties.

*Appeal from Johnson District Court.—HON. R. P.  
HOWELL, Judge.*

MONDAY, NOVEMBER 18, 1912.

ACTION to recover for rent alleged to be due from James Constantine, and to establish an alleged mortgage lien therefor on goods transferred by him through another to Demetrios Constantine. Relief, though for a lesser amount, was awarded as prayed. Demetrios Constantine appeals.—*Affirmed.*

*Ney & Bradley, for appellant.*

*S. C. Ranck, for appellee.*

LADD, J.—On February 6, 1906, plaintiff leased a store building to James Constantine for a period of three years beginning March 1st following at the rental of \$50 per month. A lease was executed containing a provision that "the lessor shall have a lien for the rent at any time due or to become due upon any and all the property of the



said party of the second part, including all goods, merchandise, fixtures, and kitchen furniture used in or about said premises of any character or description during the term of this lease, whether the same is exempt from execution or not. No demand for rent shall be necessary to entitle rights herein stipulated." This lease was duly acknowledged by the lessee and recorded December 28, 1906. As evidencing the monthly rental thirty-six promissory notes were executed by the lessee to the lessor of \$50 each payable on the 1st day of the respective months, and bearing interest at the rate of 7 percent per annum if not paid at maturity. The petition alleged that the notes maturing on the 1st days of January, February, April, May, and June, 1908, and January and February, in 1909, had never been paid, and that but \$50 had been paid June 19, 1909, on the note maturing November 1, 1908. Judgment was prayed against James Constantine for the amount of these notes, and that a lien for such amount be established against the property on the premises, conceded to be that which belonged to the lessee named in the lease and by him kept thereon. On October 3, 1906, James Constantine made a conditional sale of the property contained in the building to John Constantine and Stephen Saphos, the terms being that the purchasers were to go into possession January 1, 1907; and, when their promissory notes amounting to \$2,200, evidencing the price, were paid, the seller should execute to them a bill of sale of said property. This contract was also duly recorded. Subsequently Saphos sold his interest in the property and business to John Constantine, and about the termination of the lease the latter took Demetrios in as a partner. In the fall of 1907 plaintiff extended the building twelve feet to the rear under an agreement, as he claimed, that John Constantine would pay an additional rental of \$10 per month. John denied having so promised, but his numerous checks for \$60—each the total of the two rentals—strongly corroborate the plaintiff's

testimony, and we are satisfied that the arrangement was as claimed by plaintiff. On May 20, 1909, two months after the expiration of the lease to James Constantine, a new lease for a term of two years beginning May 1, 1909, at a monthly rental of \$60 per month, was executed to John and Demetrios. On February 3, 1911, Demetrios acquired the interest of John Constantine in the property, and interposes several defenses, which will now be considered.

I. As the lease was duly acknowledged and recorded, subsequent purchasers were charged with notice of its contents in so far as these erected any incumbrance. Even though the lien stipulated was in general terms and therein somewhat resembled the landlord's lien created by statute, this in no manner impairing its validity or the right of the lessor to enforce the same in equity. 1 Jones on Liens, section 540 et seq. The clause creating the lien was definite in terms with respect to the extent thereof and the property to which attached, for it was to secure the rent reserved in the lease, due or to become due, and to cover all the goods of the lessee on the demised premises. There is no basis for the contention that the lien thus created was but the statutory landlord's lien, or that Demetrios Constantine took without notice.

II. It is said, however, that the notes sued on had been paid. This conclusion is reached in two ways: (1) By computing all which has been paid throughout the period of both leases, and then excluding the rent of the last three months as unpaid; (2) in claiming that certain disputed items have in fact been paid. Under the sale of James to John Constantine, the latter was to pay the rent from January 1, 1907, and there is no controversy but that none was owing for the use of the premises prior to that time. The rent since January 1, 1911, has been paid. From January

1. LANDLORD AND  
TENANT:  
lien:  
notice:  
enforcement.

2. SAME:  
claim  
for rent:  
evidence.

1, 1907, to October 1, of that year it should be computed at \$50 per month and thereafter at \$60 per month, amounting without interest to \$2,790. The plaintiff concedes that he has been paid \$2,349. Appellant argues upon the assumption that the \$240 paid after January 1, 1911, was not applied on the rent thereafter maturing, and, of course, reaches the conclusion that much less at least is owing on the rent previously maturing. John Constantine testified to having paid plaintiff by check, \$50.20, June 6, 1908, and \$50, October 3, 1908. Neither of these checks were produced, but items of like amounts were charged a few days after each check was issued in Constantine's account with the bank at which he did business. No credit, however, was given plaintiff, who had an account with the same bank. But, of course, he might have indorsed the checks to others or drawn the money thereon. He explained that he thought he had indorsed one of the checks to James Constantine in payment of a note owing him by John. These items must have been allowed. A check of \$107.20 was issued to Maine by John Constantine May 20, 1908, and the latter contends that this was in payment of rent, while the former testified that it was to recoup him for a like amount paid to satisfy a judgment recovered by James Constantine against John in the justice's court. Also John Constantine testified to having paid the rental for January and February, 1908, in cash, and also to having made two payments of \$50 each in 1908. His testimony as to these payments is entirely uncorroborated and denied by plaintiff. In view of this state of the record and the fact that the several witnesses testified orally, the findings of the district court either that the \$107.20 should be credited and the alleged payments of rents for January and February, 1908, rejected or *vice versa*, and the alleged cash payments of \$50 each were not made, ought not be disturbed. If so, then the finding of the district court that \$228.25 was still owing should not be disturbed.

III. The contention that plaintiff in executing the new lease and in receiving subsequent payments of rent waived the lien of the first lease is not well founded. It is true he had first declined to execute the new lease until the rental of the former lease had been fully paid, but testified that he finally executed the lease upon the understanding that the amount due on the first lease was to be satisfied.

3. SAME: waiver  
of lien: fraud.

The notes sued on were not surrendered, and the making of the new lease in no way prejudiced the defendants, nor did the matter of application of payments, and we discover no ground upon which the doctrine of waiver can well rest, nor is fraud to be inferred from the fact that plaintiff claimed more than was finally found to be due. The evidence does not warrant the conclusion that he acted in bad faith, and therefore fraud can not be imputed to him.

It is urged that John Constantine should have been made a defendant. He had no interest in the property in controversy when the action was begun or thereafter. Judgment was not claimed against him. It was enough that the maker of the lease and notes, together with the present owner of the property, were made parties defendant.

4. SAME:  
enforcement  
of lease:  
parties.

We discover no error in the record, and the judgment is—*Affirmed*.

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BLANCHE MENGEL, Appellee, v. GEORGE MENGEL, Appellant.

**Appeal: CONCLUSIVENESS OF RECORD.** It will be assumed on appeal 1 that papers and documents included in a transcript which have been duly certified by the judge and reporter are a part of the record, though not specially identified.

**Same.** The recital in the record on appeal that a party appeared in 2 person on the hearing of an application for the order appealed

from can not be contradicted by parol, but must stand until the record has been corrected in the district court; and where the order appealed from appears from the record to have been entered in the district court, and is properly in the proceedings of that court, it will be assumed that the application was heard by the court and not a judge thereof.

**Divorce:** ADDITIONAL SUIT MONEY: JURISDICTION. The application  
3 in this divorce case for additional suit money, and the affidavits in support thereof, are held to show such a changed situation since the previous order was made as to give the court jurisdiction to grant the new order.

**Same:** APPLICATION FOR SUIT MONEY: EVIDENCE. An application for  
4 additional suit money should be treated as a motion authorized by the statute for that purpose, and may be supported by affidavits to be treated as evidence on the hearing.

**Same:** TEMPORARY ALIMONY: SUBSEQUENT ALLOWANCE. An order for  
5 temporary alimony is not a final adjudication of the rights of the parties in that regard, but the court has power to make a subsequent additional allowance.

**Same:** ALLOWANCE OF SUIT MONEY. Suit money may be allowed for  
6 the purpose of resisting an appeal from an order for temporary alimony.

**Same:** JURISDICTION. A judge as such has no power to award tem-  
7 porary alimony; this power is limited to the court itself.

**Same:** ALLOWANCE OF SUIT MONEY. Suit money for the prosecution  
8 of an appeal from an order allowing temporary alimony can only be awarded by the appellate court; and an order of the district court allowing anything for this purpose is erroneous.

**Same:** ALLOWANCE OF ATTORNEYS' FEES. Where attorneys' services  
9 in a divorce action were rendered in reliance upon defendant's liability therefor, and were necessary to the plaintiff's prosecution or defense of her case, the fact that they had already been performed is no objection to an allowance therefor.

**Same.** The fact that there had been a number of cases involving  
10 the collection of suit money previously allowed, was sufficient authority for allowing additional attorney's fees.

**Same.** To justify the reversal of an order allowing suit money  
11 it must appear that the court was without jurisdiction, or that it abused its discretion in the amount of the allowance.

*Appeal from Scott District Court.*—HON. A. J. HOUSE,  
Judge.

MONDAY, NOVEMBER 18, 1912.

FROM an additional allowance to plaintiff of temporary alimony or suit money in a suit for divorce under the title above given, defendant appeals.—*Affirmed.*

*B. I. Salinger and George W. Scott, for appellant.*

*Sharon & Higgins, for appellee.*

DEEMER, J.—This case has had a checkered career, and the record now before us is incomplete and difficult to understand. We are advised that there is now before us another intermediate order in an original divorce case brought by plaintiff against her husband, George Mengel, which latter case has not as yet been tried, although it has been pending for many years, during which time there has been a prolonged controversy over many intermediate or collateral orders. One branch of the case reached us many years ago and was disposed of, so far as this court is concerned, by an opinion which will be found reported in 145 Iowa, 737. We are informed that that branch of the case is now pending on appeal to the Supreme Court of the United States, and doubtless should take judicial notice of that fact.

The matter now before us was initiated by plaintiff filing in the district court on March 8, 1909, the following application:

Comes now Blanche Mengel by her attorney, E. M. Sharon, and asks the court to order the defendant to pay the clerk of this court the sum of five hundred dollars to be applied as partial payment of the costs and attorney's fees incurred in this cause, and in support of this applica-

tion says: That this cause was commenced in March, 1907, and that she had retained E. M. Sharon of the firm of Sharon & Donegan as her attorney in the January proceeding. That the defendant has contested the case and sought to delay the termination thereof. That there have been twenty-eight different pleadings filed in this case in this court, and the trial of the plaintiff's cause for separate maintenance and defendant's cause to annul the marriage continued five times. That her attorney has been obliged to advance up to the present date \$32.70 for sheriff and clerks' cost in this cause. That the defendant commenced an independent action to enjoin the judgment of the Supreme Court affirming the order of this court ordering the defendant to pay the plaintiff \$50 per month for her support, pending the disposition of the cause. That there have been three applications for an injunction on said allowance in this court, which were successfully contested by her attorney. That three appeals have been taken to the Supreme Court of Iowa; that one of said appeals was dismissed at time required to file abstract. One was affirmed on motion of plaintiff, and one is still pending wherein plaintiff's attorney has filed a brief and argument and an abstract of the record, the printing of which cost \$21.80. That in all of these appeals there have been numerous motions, statements, affidavits, briefs, and arguments not printed, but which required much legal work. That defendant also notified plaintiff's attorney to go to Des Moines at a hearing on the application to Judge Sherwin, of the Supreme Court, for an injunction to restrain the execution of the judgment for \$575 of the allowance for support made by this court, and her said attorney has received no repayment of his expenses, and has filed a motion to dissolve the injunction, with the answer of the plaintiff and affidavits of an officer or employee of the two banks in which it was alleged that plaintiff had funds; that such accounts were the accounts of Felicia Reuter, the daughter of plaintiff. That it is necessary for plaintiff to have funds to apply as part payment for the services of her attorney and the money expended in costs paid and payable before proceeding further in its prosecution and defense. That \$50 is all the money hereto paid said E. M. Sharon on account of his services and disbursement in this cause, and the plaintiff

has no means of her own with which to pay him except as she obtains the same from her husband, who is liable for the same. That the appeal from the order allowing support money is an appeal from an interlocutory order of this court, and this court has jurisdiction to make the allowance herein asked for. Blanche Mengel, by E. M. Sharon, her attorney.

This application was duly verified by plaintiff's attorney.

On March 30, 1911, plaintiff also filed the following motion:

Comes now the plaintiff and moves the court for an order compelling the defendant to pay the clerk of this court \$2,000 for attorney's fee and costs for expenses made necessary by litigation caused by the defendant and to enable the plaintiff to prosecute her said action in the court and the Supreme Court of the United States, and submits in aid of this motion affidavit and application filed herein about March 8, 1909, and affidavits submitted herein. Sharon & Higgins, Attorneys for Plaintiff.

With this was filed an affidavit by plaintiff's counsel, to which we shall hereinafter refer. Plaintiff also filed her own affidavit, to which reference will subsequently be made. We shall presently make such reference to the original affidavit as the record will warrant.

On April 5, 1911, defendant was served with the following notice:

State of Iowa, Scott County.

Notice of Hearing on Application for Allowance of Suit Money. Blanche Mengel, Plaintiff, v. George Mengel, Defendant. In the District Court of Said County. To the Above named Defendant: You are hereby notified that there is filed in the office of the clerk of the district court, in and for said county of Scott, state of Iowa, the application of the above named plaintiff, asking against you the allowance of \$2,000 for suit money and attorney's fees in the above-entitled cause, and that unless you appear and make defense thereto before Judge House, at the courthouse



in Davenport, in said county, on the 17th day of April, 1911, an allowance will be entered against you, and judgment rendered thereon.

Sharon & Higgins,  
Attorneys for Plaintiff.

On May 3, 1911, a hearing was had on the second of the foregoing applications in point of time at the Scott county courthouse, and we find that the following record was made thereat: Testimony was introduced tending to show an agreement between counsel for the postponement of the hearing from the time fixed in the notice until May 3, 1911. On the part of defendant, one George Scott testified that he was an attorney of record for said defendant, and that he agreed to May 3d as the date for the hearing; but it is claimed that his appearance in the case was special, and that his agreement was not binding on defendant. As he was an attorney of record for the defendant, we think his agreement was binding. But, however this may be, the transcript to which we have been compelled to resort shows affirmatively that defendant appeared in person on the morning of May 3d, and the court ordered that the matter be taken up at 1 p. m. of said day. At that time plaintiff by her attorney introduced the following from the record in the original case: The appearance docket and fee book showing the filings in the original case of Mengel v. Mengel, and in a case entitled George Mengel v. Blanche Mengel and Louis Eckhardt, the issuance of a writ of attachment and a levy thereunder, and another case of the same title as the last one above mentioned being an action on injunction bond, and, as we understand it, the pages of an appearance docket showing the filings in another case of the same title. The original application for suit money was also introduced, and also the application filed March 8, 1909, which we have heretofore set out *in extenso*.

In support of the motion for allowance of suit money

filed March 30, 1911, plaintiff also introduced the affidavit of her attorney, from which we quote the following:

E. M. Sharon, being duly sworn, deposes and says, as supplemental to his affidavit filed herein March 8, 1909, that since March 5, 1909, he has paid out for plaintiff's expenses of suit in the sum of \$61.38, and that he has been obliged to follow the dilatory appeals and reviews and rehearing instituted by defendant's counsel, and states that in addition to the matters set out in his former affidavit he has made an additional motion to dissolve the injunction granted by Judge Sherwin in February, 1908, which the Supreme Court sustained. That he made and had granted a motion for *procedendo* from the Supreme Court in the case of George Mengel against this plaintiff and the sheriff of this county, and had judgment in this court for the costs in that case. That he has commenced, and there is pending in this court, an action on the injunction bond in the above injunction case; that on March 29, 1910, said George Mengel, defendant herein, obtained from Judge Deemer, Chief Justice, an order allowing a writ of error in this case to the Supreme Court of Iowa for review of said case in the Supreme Court of the United States of America and allowing a supersedeas. The plaintiff herein applied for a modification of said order and for the allowance of attorney's fees for contesting said writ and an additional security on said supersedeas. Judge Deemer held that he did not have jurisdiction to allow attorney's fees, but did order said bond increased from \$2,111 to \$4,000. Said George Mengel failed to file the record in the Supreme Court at Washington, D. C., and in August, 1910, this plaintiff did have said record certified from the Supreme Court of Iowa on this plaintiff or her attorney filing the same—paying the costs of docketing the case, and employing counsel at Washington for that purpose, said writ of error was dismissed. That afterwards and about the 5th day of September, 1910, said George Mengel or his attorney again applied for writ of error, and again Judge Deemer granted the same and also ordered a supersedeas. Plaintiff's attorney, knowing that under the statutes and procedure in the United States courts a writ of error does not and can not be made to operate as a supersedeas unless said writ is allowed within sixty days, Sundays excluded,

from the rendition of the judgment to be reviewed, applied to Judge Deemer to have said supersedeas vacated, and supported said application with a brief. George Mengel's attorney contesting the matter, plaintiff did furnish at least two additional briefs which involved a study of the statutes and decisions of the United States and its courts. That after several months Judge Deemer refused to declare the supersedeas ineffective, but did in his final order limit its application to the particular judgment entered in the Supreme Court of Iowa, January 15, 1908. That plaintiff in error while he has complied with the rules of the United States Supreme Court and filed the records in that court prior to October 5, 1910, has not had such record printed within a reasonable time as required by said rules, and apparently intends to delay the disposition of said writ of error in that court so long as possible, and plaintiff nor her attorney have means with which to defend such suit in that court. That about June, 1910, plaintiff had issued a writ of execution on the amount due in this court on the order of August 1, 1907, for temporary support of plaintiff, which execution the defendant without notice induced Judge Jackson to recall; that such recall was canceled on plaintiff's application, but afterwards defendant in a separate suit obtained an injunction restraining execution of that judgment, and plaintiff has on file an answer and motion to dissolve. That the book charges for his services and disbursements in prosecuting this suit and defending the counter litigation of the defendant are already \$1,916.25, and, while the sum is reasonable and just, plaintiff must abandon her suit and the relief which affiant believes she is entitled to unless she can meet the contentions of the defendant in the matter of the Supreme Court of the United States and in the various suits, injunctions, and supersedeas pending in this court. The plaintiff's attorney, the affiant, has not received any money or property from plaintiff nor from other persons for or on account of this suit or those growing out of it or the matters between plaintiff and defendant except \$9.16 return cost paid clerk of United States Supreme Court, and affiant does not believe that plaintiff is able to advance him any money for his services or disbursements herein. E. M. Sharon.

And in the same connection plaintiff's own affidavit

bearing date March 24th, but filed with the motion of March 30th, reading as follows:

Blanche Mengel, being duly sworn, deposes and says that she is the plaintiff in the above-entitled cause. That she was obliged to give up her residence in Davenport temporarily in September, 1907, on the refusal of the defendant, her husband, to contribute to her support, and when defendant appealed from the order of Judge Bollinger compelling said George Mengel to pay her \$50 per month. That the only money or property she had or controlled at that time was money in two Davenport banks which was the property and had been given to her daughter Felicia. That since August 1, 1907, she has received no money or property from any source except for her personal service and assistance from members of her own family. That she has kept her daughter in a boarding school in Kentucky. That she has not paid her attorney any money for his services or disbursements since the bringing of this suit except that he retained \$50 of an allowance of \$100 ordered by the court and paid by defendant in May or June, 1907, and that she has been unable to do so and now has no money or property from which she is able to make any such payments. Blanche Mengel.

In addition to this, plaintiff offered an additional affidavit made by her attorney and filed March 31, 1911, reading as follows:

E. M. Sharon, being duly sworn, deposes and says that he is one of the attorneys of the plaintiff and has been since the commencement of this suit. That on the trial of plaintiff's suit for separate maintenance, certified record of her marriage with defendant was put in evidence. That defendant's contention was that plaintiff was incompetent to contract marriage at the time. That the records of this cause show that the prior marriage of the plaintiff with Otto Reuter had been annulled on the ground that said Otto Reuter had a wife living from whom he had not been divorced at the time of his marriage to plaintiff. That at the close of that trial Judge Bollinger announced his finding that the marriage of plaintiff and defendant was legal and valid, and that the evidence showed him to be worth

\$50,000; defendant not having contradicted plaintiff's evidence to that effect, and afterwards in open court, after plaintiff had filed her amendment, asking for a divorce. Defendant's attorneys offered to withdraw their cross-petition attacking the validity of the marriage between the parties thereto, and the reason that it was not withdrawn was plaintiff's attorneys refused to consent thereto. That the evidence taken on the trial of this cause has been transcribed, and the cost thereof, \$300 or thereabouts, has been taxed as costs in this cause, but such transcript is in the possession of defendant or his attorneys. That said transcript of the evidence is referred to in support of this motion to show the legality of plaintiff's marriage and her right to divorce in this action. That affiant further says that this action was commenced and is prosecuted in good faith by him as an attorney at law. E. M. Sharon.

The papers filed in the several cases noticed in the appearance docket were also introduced. And also a decree of this Court rendered January 23, 1908, which concluded as follows:

Now, therefore, it is adjudged and decreed that the judgment of the said district court be affirmed in all particulars, and that the appellee, Blanche Mengel, have and recover of George Mengel the sum of \$500 and 15 percent of said principal sum, with interest and costs, and judgment is hereby entered in favor of Blanche Mengel and against George Mengel and Henry Jaeger for \$575, with interest thereon from date at the rate of 6 percent per annum, and \$25 for costs of this appeal and accrued costs, and that general execution issue from this court to the sheriff of Scott county for the collection thereof. [Signed] Scott M. Ladd, Chief Justice.

Also a subsequent order entered on March 10, 1908, reading as follows:

The above-entitled cause came on for hearing on the motion of the appellee for judgment in favor of the appellee and against the appellant and the surety on his appeal bond, and the court, having considered the statements and arguments in favor of said motion, filed for the appellee by

Sharon & Donegan, her attorneys, and those in resistance by Ruyman & Ruyman and Sallinger, Scott & Theophilus for the appellant, and the court, being fully advised in the premises, finds that this court did on the — day of January, 1908, affirm the order and judgment of the district court of Scott county, made and entered August 1, 1907, by which the appellant herein was ordered to pay the appellee herein the sum of \$250 on or before August 5, 1907, and \$50 per month on the first day of each month thereafter, until final judgment herein, and that this court did on the 23d day of January, 1908, enter judgment thereunder for the sum of \$500, being the sum at that time due, with penalty and costs; and further find that there is now due on said order the sum of \$100, being the payments due on February 1 and March 1, 1908, and that no remand of this appeal has been made or asked for by the appellee, and all the record pertaining to said matters having been certified to and filed in this court, now it is adjudged and decreed that the appellee, Blanche Mengel, have and recover of George Mengel, the appellant, and Henry Jaeger, surety on the appeal bond of appellant, the sum of \$100, and judgment is hereby entered against said George Mengel and Henry Jaeger in the sum of \$100 with interest thereon at the rate of 6 percent per annum and costs and accrued costs taxed at \$——, and that the clerk of this court issue under the seal thereof execution to the sheriff of Scott county, Iowa, for the collection thereof, and that this matter be continued until further order of this court.

The original order for temporary alimony is in the record, and it is as follows:

It is ordered that defendant pay to plaintiff for her support the sum of \$50 per month from April 1, 1907; \$250 of said money to be paid within five days from this day, and \$50 on September 1, 1907, and \$50 on the first day of each month thereafter until final judgment in this case or until otherwise ordered by the court. Defendant excepts. Jas. W. Bollinger, Judge.

This was entered on August 1, 1907. The record also shows an order of date February 12, 1908, overruling de-

defendant's motion to vacate the order of August 1st. There is also a showing of an appeal from an order denying defendant a temporary writ of injunction against the enforcement of the original order for temporary alimony. Also a copy of a resistance filed for defendant to a motion for a judgment in this court pursuant to the order of affirmance entered in January of the year 1908, and also a like resistance to a motion said to have been filed in September of the same year. A showing is also made of defendant's dismissal of the appeal taken by him from the order of the district court denying him a temporary writ of injunction against the enforcement of the order for temporary alimony. Included in the record is a supplemental opinion filed by this court in response to defendant's petition for rehearing on the appeal from the allowance of temporary alimony; also a copy of the original opinion filed March 12, 1909. The record also shows the allowance of an appeal from the decree of this court to the Supreme Court of the United States, and a dismissal of that appeal by the United States Supreme Court for failure to file and docket the case; this dismissal having been entered August 19, 1910. The record also contains a motion by plaintiff to vacate a supersedeas order entered by one of the justices of this court, with an argument thereon in print or typewriting; also a motion to modify the supersedeas order, for additional security, and for an allowance of additional attorney's fees. This motion was also addressed to the then chief justice of this court. The record of the proceedings in the district court in the original case is also presented by the record before us, and this shows the overruling of a demurrer filed by defendant and his insistence upon a trial of the main case, orders fixing a day therefor, and the release of some of the attached property. The record also shows the allowance of a second writ of error to the Supreme Court of the United States, of date September 3, 1910, together with an order for a supersedeas upon defend-



ant's filing a bond in the sum of \$4,000. This is the entire record in the case, and it is needless to say it is in an extremely confused condition. On account of the nature of the abstracts we have been compelled to resort to the transcript, and from that we have made the necessary excerpts and quotations. It is hard to extract a clear or satisfactory statement as to the nature of the controversy, but the trial court on this showing, and none other, made the following order:

This matter came on to be heard on the application of the plaintiff for the allowance of \$2,000 suit money to pay in part costs and attorney fees incurred, and to defend and prosecute pending litigation. The plaintiff appeared by Sharon & Higgins, her attorneys, and the defendant appeared in person. And the court finds that jurisdiction of the parties and subject matter is complete, and the plaintiff has introduced in evidence affidavits and records in cases pending; and, the court, being fully advised in the premises, it is ordered and adjudged that defendant pay to the clerk of this court for the use of the plaintiff and her attorneys the sum of \$800 as suit money to enable her to prosecute and defend the litigation involving her rights to a divorce from the defendant and the support money hereto granted her by this court, and on failure of defendant to so pay said sum forthwith that execution issue for the collection thereof. This allowance shall be in addition to, and shall not affect, the allowance made by this court August 1, 1907; and this allowance is made without prejudice of the rights of the plaintiff or her attorneys to recover from the defendant costs and attorney fees heretofore disbursed and accrued, as determined by the court on final determination of this cause, or sooner if the conditions and circumstances justify the same. The defendant excepts. A. J. House, Judge.

The appeal is from this last order, and many errors are assigned and reasons advanced why the order so made should be reversed.

I. While it is true that many of the papers and documents to which we have referred are not specifically identi-



fied, they are all included in the transcript, which is duly certified, and we must assume that they are a part of the record in the case below, as they are certified to by both the judge and the reporter.

1. **APPEAL:** conclusiveness of record.

It is contended that the court or judge making this order had no jurisdiction, because if made by a judge he had no jurisdiction, and if made by the court defendant

2. **SAME.** had no sufficient notice of the time set for hearing and did not appear. As to this it

appears that defendant did have notice of the hearing, but this seems to have been postponed by consent of one of his counsel of record. Aside from this, the record recites in at least two places, and once in the final order, that the defendant did appear in person. These recitations can not be contradicted by parol, and until corrected in the district court must stand as a verity. Again the final order seems to have been entered by the district court and is properly of record in the proceedings in that court. We must assume, therefore, that the matter was heard before the district court.

II. It is argued that the court had no jurisdiction of this last application for the reason that it shows no change in the situation or circumstances of the parties since the

3. **DIVORCE:** additional suit money: jurisdiction. original order for temporary alimony was made, and the application calls for nothing more than a review of the original order.

The present application is very informal in character; but, taking all the papers together, we think it sufficiently appears that plaintiff's application was for additional suit money due to change of situation since the original order was made. The recitals in the applications themselves, together with the affidavits attached thereto, sufficiently show the character thereof, and doubtless gave the court jurisdiction.

The application should be treated as a motion, and it

is expressly provided by section 3833 of the Code that motions may be supported by affidavit, and such affidavits may be considered as testimony upon the hearing. That such an application should be by motion is expressly held in *Simpson v. Simpson*, 91 Iowa, 235; *Finn v. Finn*, 62 Iowa, 482.

Aside from this, however, the court has power to make subsequent charges in an order for temporary alimony. In *Clyde v. Peavy*, 74 Iowa, 47, we said: "Orders made for temporary alimony for the support of the wife and for attorney's fees, or suit money, as it is sometimes called, are not like ordinary money judgments. They can not, in the very nature of things, be regarded as final adjudications as to the rights of the parties. These orders are usually made to continue from term to term, for the reason that it is impossible to determine at the beginning what the necessities of the litigation may require. It may continue for years, and the court can not determine in advance that any named sum of money ought to be a full allowance for all purposes. This being the nature of the proceeding, no mere temporary order can be said to be a final adjudication. Additional allowances may be made from time to time."

III. Again it is argued, as on the former appeal, that the trial court, by reason of defects in the petition in the original divorce action, had no jurisdiction to make any order whatever. This point was ruled adversely to appellant on the former appeal, and in addition to this it is admitted that, before the last application was submitted, plaintiff amended her petition so as to cure the defect therein. There is nothing in this last proposition.

IV. Next it is argued that the allowance here made was unauthorized because of the fact that it was for the protection of an order previously made for suit money, and that, if such an allowance should be made, there would be no end to the matter. In other words, that each order

is appealable, and if suit money were allowed to resist each appeal there would be an endless chain.

6. SAME:  
allowance of  
suit money.

We have no doubt of the inherent power in some court to make an allowance to a wife of suit money for the purpose of resisting an appeal taken by her husband from an award of temporary alimony. Such an appeal is authorized and a supersedeas may be given; and, if the wife can have no allowance of suit money to resist the appeal, she may be deprived of the very thing which was necessary to the prosecution of her suit. There ordinarily is an end to all things, even of a lawsuit, although no one yet has been able to see the end of this controversy which has proceeded no farther than an allowance to plaintiff of temporary alimony and suit money with which to prosecute her main action. True there have been a large number of other suits, but these have grown out of the original order for suit money which has not yet been complied with. Nelson, in his work on Divorce and Separation, at section 862, states the law on this subject as follows: "The weight of authority is that such order may be stayed by the execution of a suitable undertaking and the case may be reviewed without awaiting a final decree in the action for divorce. The undertaking must conform to the provisions of the Code, and should be in double the amount of the order for a reasonable time within which the appeal can be determined, and for costs. After the filing of such undertaking, the court may make another order compelling the husband to pay costs and attorney fees to enable the wife to resist the appeal." Although no cases are cited to the last proposition, we think it sound doctrine, and adopt it as the rule for this state.

V. Before passing to the next point in order, it should be stated in this connection that we agree with

7. SAME:  
jurisdiction.

counsel in saying that a judge, as such, has no power to allow temporary alimony. The statute in express terms limits this power to the court

itself. Code, section 3177. But we have already found that the hearing was before the court, and the final order was entered by it. *Prosser v. Prosser*, 64 Iowa, 378; *Shaw v. McHenry*, 52 Iowa, 186.

VI. The next question in order is the power of the district court to allow suit money on an appeal to this court. According to our more recent holdings, the appellate tribunal is the only one to make such an allowance. *Shors v. Shors*, 133 Iowa, 22; *Lewis v. Lewis*, 138 Iowa, 593. This seems to be the rule in other jurisdictions. *Cralle v. Cralle*, 81 Va. 773; *Jenkins v. Jenkins*, 91 Ill. 167; *State v. Phillips*, 32 Fla. 403 (13 South. 920); *Goldsmith v. Goldsmith*, 6 Mich. 285; *Pleyte v. Pleyte*, 15 Colo. 125 (25 Pac. 25); *Coad v. Coad*, 40 Wis. 392. In so far as the order included anything for attorney's fees for the prosecution of an appeal here, it was erroneous under the authorities cited.

VII. Again it is said that no allowance should be made for attorney's services already rendered. If these had been paid or plaintiff had any separate property with which to meet them, or if the services had been rendered on the strength of plaintiff's credit, there would be no doubt of appellant's position. *Bohnert v. Bohnert*, 91 Cal. 428 (27 Pac. 732); *Beadleston v. Beadleston*, 103 N. Y. 402 (8 N. E. 735); *McCarthy v. McCarthy*, 137 N. Y. 500 (33 N. E. 550). But where the services are rendered and not paid for, in reliance upon the husband's liability to pay, and were necessary to enable the wife to further prosecute or defend her case, it is no defense that they have already been performed. See *Bohnert v. Bohnert*, *supra*.

VIII. Finally it is argued that there is no proper showing upon which to base an allowance of additional attorney's fees. If the affidavits filed by plaintiff and her attorney are to be considered, as we think they should be, for reasons already stated,

8. SAME:  
allowance of  
suit money.

9. SAME: allow-  
ance of attor-  
neys' fees.

10. SAME.

they show enough, in our opinion, to justify the allowance made by the trial court. That court had jurisdiction of the main case and power to make necessary allowances of suit money, save as by appeal some other court may be vested with exclusive jurisdiction in such matters. In connection with the original order for temporary alimony, the record shows a number of cases to enforce and to defeat the collection of the allowance made. These cases were in the district court of Scott county, and were proper to be taken into account in making the allowance of additional attorney's fees. Again it seems that orders made by judges of this court in some of these collateral cases had to be met and set aside, and enough other work which the district court might properly consider was shown to relieve the district court from the charge of an abuse of discretion in making the allowance.

To justify the reversal of such an order it must be shown that the trial court had no power or authority to grant it; in other words, that it was without jurisdiction, or that it abused its discretion in the amount of the allowance. *Campbell v. Campbell*, 73 Iowa, 483. Neither of these facts is shown.

This opinion is inexcusably long, and it may be that the case does not demand it. But the record is such that we felt driven to a long opinion fully covering the matter, or else to a memorandum opinion affirming the order without more.

In view of the arguments presented, we adopted the former course, with the result that the order must be, and it is.—*Affirmed*.

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ED. WELSH, Appellant, v. GUST HALEEN.

**Pleadings: AMENDMENT.** It was not an abuse of discretion for the court to permit the defendant, at the close of all the evidence, to amend his counterclaim for the wrongful suing out of an

attachment, so that the same would be based on the attachment bond.

**Wrongful attachment: MALICE: BURDEN OF PROOF: INSTRUCTION.**

2 Under a counterclaim for wrongful attachment, an instruction that if plaintiff had no reasonable cause to believe the ground alleged for the attachment to be true, the jury might infer that it was maliciously sued out, was neither erroneous nor placed the burden on plaintiff to show want of malice; especially as the court further told the jury that the burden was upon defendant to show that plaintiff had no reasonable cause to believe that the ground stated for the attachment was true, which carried with it the burden of proving malice.

**Same: BURDEN OF PROOF.** Where there is direct proof of malice in

3 suing out an attachment, it combines with the inference of malice to be drawn from the fact that the attaching creditor had no reasonable cause for believing that the ground of the attachment was true, in establishing the preponderance of evidence required of the party alleging that the attachment was wrongful.

**Same: EXEMPLARY DAMAGES: EXCESSIVE VERDICT.** The allowance of

4 exemplary damages and the amount thereof rests with the jury; and the instruction that where malice is found the jury is not limited to actual damages, nor required to scrutinize the amount of the verdict very closely, was not erroneous; as it could only be understood to apply to the amount of exemplary damages. There was warrant for the allowance of both actual and exemplary damages in this case, and the verdict is not so large as to warrant interference.

*Appeal from Boone District Court.—HON. ROBERT M. WRIGHT, Judge.*

TUESDAY, NOVEMBER 19, 1912.

THE facts are stated in the opinion.—*Affirmed.*

*Goodykoontz & Mahoney*, for appellant.

*D. G. Baker*, for appellee.

SHERWIN, J.—The plaintiff brought this action on an account claimed to be due from the defendant, who was

for several years a tenant on his farm. The action was aided by a general attachment. The defendant filed counterclaims for sums said to be due him on account, and for the wrongful suing out of the attachment. The case was tried to a jury, and a general verdict was returned for the defendant upon which judgment was entered. The plaintiff appeals.

1. PLEADINGS:  
amendment.

The plaintiff's account amounted to \$261.75, and of this sum \$100 was claimed for feed furnished to two colts that defendant had kept on the place for a time before the termination of his tenancy. The defendant counterclaimed on an account amounting to \$77.68, and in a separate counterclaim asked damages for the wrongful suing out of the writ of attachment. Defendant admitted in his answer that there was due the plaintiff on his account the sum of \$144.84, and plaintiff admitted defendant's account to the extent of \$9.69. The defendant's original counterclaim for the wrongful suing out of the attachment was not based on the attachment bond, and, after the close of the evidence, the plaintiff moved for a directed verdict on that part of the case for the reason above stated. Thereupon, the court told defendant's attorney that he might amend, and he did so, whereupon the motion to direct was overruled. There was no abuse of the court's discretion in the matter, and the plaintiff does not appear to have been prejudiced by the indulgence. Permitting the amendment operated to give both parties an opportunity to submit their claims to the jury, and was in the interest of justice to both.

Some other minor matters are complained of, but we see nothing of a nature requiring more specific treatment, and we shall, therefore, discuss the grounds upon which appellant evidently relies for a reversal.

The most serious complaint is made of instruction No. 15, wherein the jury was told that, if it found that plaintiff had no reasonable cause to believe that either of the grounds alleged for attachment were true, then, in such

case, the jury would have a right to infer that the attachment was maliciously sued out. Appellant's principal contentions at this point are that the instruction did not state the correct rule of law, and that, if it did, it placed the burden, under the record, on plaintiff to show want of malice. The rule stated is in harmony with *Ahrens v. Fenton*, 138 Iowa, 559, and the cases therein cited, and need not be further discussed here. In another instruction the court distinctly told the jury that the burden of proof was upon the defendant to prove that plaintiff had no reasonable ground to believe that the grounds stated for the attachment were true, and this burden carried with it the burden of proving malice, because, under the instructions, malice could only be inferred from facts proven by defendant. The inference of malice, under the circumstances given, may be inferred whether there is direct proof of malice or not.

If there is direct proof thereof, the two combine in establishing the preponderance that must be furnished by the defendant. Here there was independent evidence from which the jury might have found malice, and we think the evidence, as a whole, sufficient to warrant the verdict.

The court instructed that, where malice is found, the "jury are not limited to actual compensation nor are they required to scrutinize very closely the amount of the verdict." This language seems to be so clear that a jury could not have understood it to apply to any matter other than the amount of exemplary damages allowed, if any were allowed.

The matter of allowing exemplary damages and the amount thereof rests with the jury. *International Harvester Co. v. Hardware Co.*, 146 Iowa, 172; *Union Mill v. Prenzler*, 100 Iowa, 540.

Appellant argues that the record shows that the jury



awarded the defendant exemplary damages all out of proportion to the actual damages proven. We shall not attempt to determine just the amount of actual or exemplary damages allowed by the jury. It is true that defendant's actual damage could not have been large, but, in any event, the exemplary damages actually allowed can not exceed about \$90, and it may be even less than that amount. There was actual damage and a warrant for exemplary damages, and we do not think the latter so excessive as to require our interference therewith. We find no substantial reason for either modifying or reversing this judgment, and it is therefore—*Affirmed.*

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SEDGWICK S. BRINSMAID, Appellee, v. THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, Appellant.

**Accident insurance: EVIDENCE.** In this action for the accidental death of insured the evidence is held to be in conflict as to whether deceased came to his death from drowning, or from the rupture of an artery while bathing, and to require submission of the case to the jury.

*Appeal from Polk District Court.*—HON. HUGH BRENNAN, Judge.

TUESDAY, NOVEMBER 19, 1912.

THIS is an action at law upon a certificate of membership in the defendant association. The defendant is a mutual association and purports to issue accident insurance to its members. Thomas F. Brinsmaid was one of its members in good standing. It is averred that he lost his life on November 27, 1907, by drowning at Long Beach, Cal. The circumstances of his death are made to appear by the evidence in the record. The defendant denies that the insured met his death by drowning, and avers that such death

was caused by rupture of the large artery near the heart, known as the aorta. The question was submitted by the trial court to the jury, which found for the plaintiff. Judgment was entered upon the verdict, and the defendant appeals.—*Affirmed.*

*Sullivan & Sullivan, and Vorys, Sater, Seymour & Pease, for appellant.*

*Clinton L. Nourse, for appellee.*

EVANS, J.—There is no controversy in this case over the fact of death. The sole dispute is as to the cause of it. It is undisputed that on November 27, 1907, the insured went bathing at Long Beach, Cal.; that he was apparently well and strong when he entered the water; that he in some manner became helpless to save himself, and that he was later taken from the water either actually dead or so nearly so that all efforts at resuscitation failed. The insured was forty-four years of age, six feet one inch tall, weighed from one hundred and ninety to two hundred pounds, in apparently fine physical condition, all "muscle and bone," without surplus tissue. Eyewitnesses testified to the circumstances of the alleged drowning. The testimony on behalf of the plaintiff tends to show that the tide was running unusually high and the breakers and the undertow were unusually strong. One of the witnesses who first saw the peril of the insured and went to his assistance was Mrs. Pitcher, who testified as follows: "The breakers were running high that afternoon. At the farthest point Mr. Brinsmaid went out, I should say it was about six or seven feet deep. I noticed him when he first went out. The breakers went over him. When I reached him, the water was six or seven feet deep. The breakers would have gone over me if I had not jumped. I had to jump to get over them. I was a strong and good swimmer at that time, ac-

customed to the surf. I was three or four days getting over it. The tide was very high that afternoon." Cross-examination: "I saw Mr. Brinsmaid when he first went into the water, and my eye followed him out. He went out through the breakers. I watched him for five minutes or more until I first noticed him acting queerly. At the time, he was being knocked down by the breakers; he was not under water, of course, for more than a second at a time. I should say that, if a person gets knocked down once by the breakers, it would be quite hard to get their feet again, and a breaker coming in would knock him down again. It is very liable to happen to any good swimmer. After being struck by the first breaker, Mr. Brinsmaid was knocked down into the water. He then came up to the surface and was knocked down again. Then I did not watch him for a few seconds, and then I saw him floating on his back. When I got to him I seemed to feel a shock go through his body, and thought I heard him groan." Also: "Mr. Brinsmaid went out four hundred or five hundred feet through the breakers. The breakers were high that afternoon. He went out a couple hundred feet farther than I did, and I think it would be about six or seven feet deep there. I noticed him, and it seemed like he was trying to help himself along and motioning with his hands. I stood there and watched him. Until he turned over I was not certain he needed help." Other testimony along the same line we need not repeat. Doctors were called and efforts at resuscitation continued for the space of two hours. When the body was taken from the water the heart was beating, and so continued for some time. During the efforts at resuscitation, other signs of life appeared, but the final result was failure. On the face of it, this evidence would seem ample warrant to support the finding of the jury that the insured came to his death by drowning. If drowned, there is no controversy made but that such drowning was accidental and within the terms of the insurance certificate.

On behalf of defendant it was made to appear that an autopsy was held by Dr. Campbell, assistant to the coroner. Dr. Campbell testified that he found an aneurism in a branch of the aorta, and a rupture of the artery at such point. An aneurism is said to be a tumor and is the result of disease in the coats of the artery. This rupture was alleged to be about one-half inch by three-eighths. It is undisputed that if such rupture had occurred during the life of the insured it would cause instantaneous death. No one assisted Dr. Campbell in the autopsy, nor was any one present except the undertaker. That a jury would have been justified in finding such rupture to have been the cause of death, there can be no doubt. But the contention of the defendant is that there was no fair conflict in the evidence as to the cause of death, and that the trial court should have directed a verdict for the defendant. And this is the only question before us. It is enough to say that there are many facts testified to by witnesses for the plaintiff which are wholly inconsistent with the theory of instantaneous death as a result of the alleged rupture. The truth of the testimony to establish such facts was, of course, for the jury. The doctors who worked over the body in efforts at resuscitation testified on behalf of the plaintiff. Their opinion was that drowning was the cause of death, and the facts upon which such opinions were based were fully stated in their testimony. The expert testimony to the contrary, except that of Dr. Campbell, was wholly hypothetical.

We can not assume to weigh the evidence in this review, or to determine where its preponderance lies. What is clear to us is that there was a fair conflict of evidence on the pivotal question, and the trial court could not properly have directed a verdict. All the assignments of error and argument are directed to this one proposition.

The judgment of the trial court must therefore be —*Affirmed.*

**E. W. HOFFMAN**, as Administrator of the Estate of **H. A. Sturdevant**, deceased, Appellant, v. **THE CEDAR RAPIDS & MARION CITY RAILWAY COMPANY**.

**Evidence: EXAMINATION OF WITNESS: DISCRETION: PREJUDICE.** Re-

1 fusial to permit a witness to state on direct examination how he arrived at his conclusion regarding a certain distance to which he had testified was not an abuse of discretion, nor was it prejudicial: where it developed on his cross-examination that he had seen the measurements made.

**Same: CROSS-EXAMINATION.** The cross-examination of expert wit-

2 nesses is largely a matter of discretion; and where it was not apparent what bearing the rejected evidence would have upon the issues, or that it would tend in any way to modify the testimony already given by the witness, its rejection was not reversible error. In the instant case the evidence sought was the subject of direct testimony and not to be elicited on cross-examination, where it had not been referred to on direct examination.

**Instructions: REFERENCE TO PLEADINGS.** Where the amended petition

3 was treated by the court in its instructions as the petition in the case, and the jury had no knowledge of any other petition, subsequent reference in the instructions to the allegations of the petition was not erroneous.

**Same: WITHDRAWAL OF ISSUE: PREJUDICE.** Where it was alleged that

4 defendant's street car was operated at a dangerous, reckless and illegal rate of speed, but there was no evidence that the speed was illegal, withdrawal from the jury of any claim that the car was operated at an illegal rate of speed was not erroneous, on the ground that the jury might have been thus led to believe that no issue remained concerning the dangerous and reckless speed.

**Street railways: NEGLIGENCE: LAST CLEAR CHANCE: INSTRUCTIONS.**

5 Where the court clearly instructed that it was the duty of the motorman to stop his car to avoid injury to decedent after discovering his peril, failure to refer to the duty of the motorman to "slow down" the car, as requested by plaintiff, was not erroneous; as the duty to reduce the speed is included in the requirement to bring the car to a stop.

**Same: DEGREE OF CARE: INSTRUCTIONS.** Where the court correctly  
6 instructed that it is the duty of a street railway company to use the highest care and foresight for the safety of passengers consistent with the practical operation of its cars, the further instruction that it is the duty of the motorman at all times to use reasonable care to prevent injury to all persons using the street, as well as passengers upon his car, was not erroneous, as tending to lead the jury to think that he was only required to use reasonable care for the safety of passengers.

**Same: CUSTOM: INSTRUCTION.** Where there was no evidence of a  
7 custom or usage to enter a street car at the front left-hand door, so that a person on the step would be in danger of being carried by a moving car against a trolley post, the refusal of an instruction that plaintiff's decedent had the right to assume, in the absence of knowledge to the contrary, that defendant had so constructed its tracks as not to expose a person to danger in so entering the car, was proper.

**Same: NEGLIGENCE: WARNING: INSTRUCTION.** In the absence of any  
8 showing that the motorman knew or should have known that decedent was attempting to enter the car at the front left-hand door, refusal of an instruction that after he became aware of deceased's intention to thus enter the car, thereby placing himself in peril, it was the duty of the motorman to warn him not to do so, was proper.

**Same: LAST CLEAR CHANCE: INSTRUCTIONS.** Where the jury was  
9 told that contributory negligence of deceased would bar recovery, the further instruction in explanation of the rule of the last clear chance, that if, after becoming aware of the peril of deceased, the motorman negligently failed to use the highest degree of care to avoid injury to him defendant would be liable, was not misleading.

**Same: PASSENGERS: INSTRUCTION.** Where the court gave a proper  
10 instruction regarding the care required of a carrier for the safety of its passengers, failure to define who is a passenger was not erroneous, in the absence of a request for such an instruction.

**Same: COMPANY RULES: VIOLATION: NEGLIGENCE: EVIDENCE.** The rules  
11 adopted by a railway company for the regulation of the conduct of its employees are not admissible in an action for the death of a third person, not charged with knowledge of such rules and not having acted in reliance thereon, for the purpose of showing that the company was liable for negligence on account of a violation of such rules.

Deemer and Weaver, JJ., dissenting.

*Appeal from Linn District Court.*—HON. F. O. ELLISON,  
Judge.

FRIDAY, DECEMBER 13, 1912.

ACTION to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of defendant. There was a verdict for the defendant, and from the judgment on such verdict the plaintiff appeals.—*Affirmed.*

*Rickel & Dennis*, for appellant.

*William G. Clark* and *W. E. Steele*, for appellee.

McCLAIN, C. J.—The defendant maintains and operates in Cedar Rapids an electrical street car line, and on First avenue, running east and west, it has a double track; the trolley wires being supported by iron posts set in a row about 150 feet apart between the two tracks. On July 19, 1908, as one of the cars of the defendant coming from the east on the north line of track along said avenue approached the west side of First Street West, H. A. Sturdevant, plaintiff's intestate, coming from the south along the west side of First Street West, attempted, while the car was still in rapid motion, to enter it by the front vestibule door on the south or left-hand side of the car, the door at that time being open, and after he had mounted the step, but before he had entered the vestibule, he was carried by the motion of the car against an iron trolley post situated a few feet west of the sidewalk and received injuries from which he died. The negligence of the defendant alleged in plaintiff's amended and substituted petition was that it carelessly and negligently constructed its tracks so near the line of trolley poles as to render the act of getting on and off its cars at the place where

Sturdevant received his injuries hazardous and dangerous; that it negligently operated the car in question with the front vestibule door open and without barricade on the south or left-hand side next to the line of trolley poles so as to invite entrance on that side, and with the knowledge of a usage and custom of passengers to board its cars on the side nearest the line of poles; that the motorman in charge of the car carelessly and negligently failed to have his car under proper control while crossing said First street, and carelessly and negligently failed to keep a proper lookout for passengers and persons about to board his said car, and carelessly and negligently failed to discover decedent when he was about to board said car, and negligently failed to stop the car after said motorman should have discovered decedent in his dangerous and perilous position while attempting to enter the car on that side; and that the motorman ran the car across said First street at a dangerous, reckless, and illegal rate of speed, in direct violation of defendant's rules and regulations. The defendant denied all allegations of negligence.

We have not attempted to state in further detail the plaintiff's allegations of negligence, for the reason that no complaint is made of the failure of the court in its statement to the jury of the issues to present to the jury all the issues raised by the pleadings.

I. Certain rulings of the court in the admission or rejection of evidence are complained of, and these may first be briefly noticed.

A witness for the plaintiff, a boy of twelve years of age, having testified that, when he last saw deceased, the latter was standing east of the trolley pole where he was struck, and about twenty-three or twenty-four feet from it, was asked by counsel for plaintiff how he arrived at his conclusion about the distance to which he referred, and who was with him. To this question it was objected that

1. EVIDENCE: ex-  
amination of  
witness:  
discretion:  
prejudice.



it was in effect a cross-examination by the plaintiff of his own witness, and the objection was sustained. The court has, of course, a reasonable discretion in determining the character of questions which may be asked of a witness.

But however that discretion may have been exercised in the present instance, whether reasonably or not, is immaterial, for on subsequent examination by defendant's counsel it appeared that the witness had gone to the place on the preceding day with counsel for plaintiff, and had seen the measurements of the distance to which he referred actually made. No possible prejudice could have resulted from the ruling complained of.

A witness for the defendant, being called as an expert to testify as to the distance within which a car could be stopped, and having stated on cross-examination that he  
2. SAME: cross-examination. never saw any test made as to the distance within which a car could be stopped under certain conditions when going two or three miles an hour, and could not say how far such car would go before the wheels commenced to turn the other way on applying the reverse, was asked to state within what distance a car going two miles an hour could be stopped with the use of the brakes. An objection to this question as being incompetent, irrelevant and immaterial and not proper cross-examination was sustained. We have read the record of the testimony of this witness, and are fully satisfied that the ruling of the court was within the scope of the exercise of its reasonable discretion. It does not appear what bearing an answer to this question would have had on the issues presented to the jury, or that such answer as the witness might have given would have tended in any way to modify the testimony he had already given with reference to the subject-matter under investigation. He had not testified on direct examination as to the distance within which a car operating at the speed of two or three miles an hour could be stopped.

If it was important for the plaintiff to have the opinion of the witness as to the distance within which a car going at that rate of speed could be stopped, we think the subject was one for direct testimony on his behalf. If the purpose was to test the credibility of the expert witness, then an answer to the question would have been of no value, for there was no evidence in the case with which the answer of the defendant could be compared in making such test. The subject of the latitude of cross-examination even of expert witnesses is largely within the court's discretion, although it is no doubt true that considerable latitude in this respect is properly permitted. Other objections to the ruling of the court relating to the cross-examination of this witness were so manifestly within the scope of its reasonable discretion that a discussion of them would be superfluous.

II. The court in its instructions treated the amended and substituted petition as the petition in the case, stating to the jury the issues of fact presented by defendant's answer thereto. There was no error, therefore, in referring later in the instructions to the allegations of the petition; for the jurors, having no knowledge of any petition save that designated by the court as the petition, to wit, the amended and substituted petition, could not have understood that the court was directing their attention to the first petition in the case, which had been superseded and which had not been referred to in the trial of the case.

III. After stating the issues in two instructions which are not presented in the record save by a general statement of their subject-matter, the court gave an instruction withdrawing from the jury any claim that the defendant was operating the car on which the accident occurred at an "illegal rate of speed" at the time in question, and this is complained of on the theory that the jurors might have been misled into

3. INSTRUCTIONS:  
reference to  
pleadings.

4. SAME: with-  
drawal of  
issue:  
prejudice.

supposing that all questions as to negligence in the speed at which the car was being operated were withdrawn. Plainly the instruction could not have had any such effect. The allegations of negligence in the petition which the court must have properly referred to in its instruction stating the issues related to a dangerous and reckless, as well as an illegal, rate of speed, and the sole effect of the instruction withdrawing an issue as to an illegal rate of speed was to leave it for the jury to say whether under the evidence the rate of speed was dangerous and reckless. It is not contended that there was any error in withdrawing the issue as to an illegal rate of speed *per se*, and as we understand the record there was no evidence that the car was being operated at a rate of speed prohibited by statute or ordinance at the point where the accident occurred. It is clear, therefore, that the jury could not have been led by the instruction given to assume that no question remained for their consideration as to a dangerous and reckless rate of speed.

IV. An instruction was asked as to the doctrine of the last fair chance. That subject was covered at length, however, in instructions given by the court which are

5. STREET RAIL-  
WAYS:  
negligence:  
last clear  
chance:  
instructions.

criticised only in that they referred to the failure of the motorman, after knowledge of the peril of the deceased, to stop the car so as to avoid the injury to him; whereas, the instructions asked related to the failure of the motorman under such circumstances to stop or "slow down" the car so as to have avoided the accident. We think the objection to the court's instructions in this respect is hypercritical. The duty of the motorman assumed in the instruction asked and specifically stated in the instructions given was to use reasonable care to avoid injury to decedent after his peril was apparent, or should have been apparent under the circumstances, to the motorman. If he employed every reasonable means available to him to stop

the car, he necessarily would have used every available means for reducing the speed, and, if a mere reduction of speed without a complete stopping of the car would have avoided the injury to decedent, then, under the court's instructions, the negligence of the motorman would have been sufficiently made out. Clearly there was no error in failing to specifically refer to the duty of the motorman to "slow down" the speed of the car.

V. In one of the instructions given, the court specifically and correctly instructed as to the degree of care required of defendant in providing for the safety and security of passengers being transported as

6. SAME:

degree of care:  
instructions.

the highest degree of care and foresight reasonably consistent with the practical operation of its railway and the conduct of its business. This instruction was given in response to the claim of plaintiff that decedent, after he had attempted to enter the car by the front vestibule door, had become a passenger, entitled to protection as such. But it is contended it was error in the next instruction to tell the jury that it was a duty of the motorman "at all times to use due diligence and reasonable care to prevent injury to those people who may be using the street as well as the passengers upon such car." It is evident in the connection in which this last statement is made that the court was not attempting to limit the degree of care required as to passengers to reasonable care, and that the jury could not have so interpreted the instruction. Of course, the motorman was bound to use reasonable care as to persons on the street and as to passengers as well. The higher degree of care required as to passengers in distinction from other persons was specifically stated. The propositions of law thus stated to the jury were correct, and the jury could not have been misled into supposing that as to passengers the degree of care required of the motorman was that of reasonable care only. The instructions were in no way conflicting.

VI. There was some evidence tending to show that passengers frequently entered the cars of the defendant through the door into the front vestibule on the left-hand side, if the door was open, and the plaintiff asked an instruction to the effect that decedent in mounting the car in that manner had the right to assume, in the absence of knowledge to the contrary, that defendant had so constructed and maintained its tracks and trolley supports as to not unnecessarily expose him to danger in boarding the car in question. The instruction asked was erroneous in assuming without any evidence whatever that the decedent was aware of a custom or usage to enter the car in that manner, and also in assuming that there was evidence of a custom or usage to do so while the car was in motion; for the evidence did not tend to show any custom or usage to attempt to enter through the door on the left-hand side in the front vestibule when the car was moving, so that a person on the step would be in danger of being carried against a trolley post. The instruction was properly refused.

VII. Another instruction asked and refused was predicated upon the thought that after the motorman became aware, or should have become aware, of the intention of deceased to mount the car at the front end on the left-hand side, thereby placing himself in a position of peril, it was the duty of the motorman to warn the deceased not to mount the car at that place, for by so doing the accident might have been prevented. But we find no evidence tending to show that the motorman either knew, or should have known, that the deceased was attempting to enter the car in this manner in time to have given any warning which would have prevented the accident. It must be borne in mind that the deceased attempted to enter the front vestibule door on the left-hand side while the car was in motion, and within a few feet of the trolley post against which he

7. SAME:  
custom:  
instruction.

8. SAME:  
negligence:  
warning:  
instruction.

was carried by the motion of the car, and that the jury was fully instructed as to the duty of the motorman to exercise the highest degree of care practicable after the deceased had, by mounting the step, placed himself in a position of danger to avoid injury to deceased by stopping the car. No further instruction on the subject was called for under the evidence.

VIII. In one of the instructions given the jury was told that contributory negligence of deceased would bar recovery, and in another that, notwithstanding the contributory negligence of deceased, the defend-

9. SAME: last  
clear chance:  
instructions.

ant would be liable if, after the motorman became aware of the dangerous position of the deceased, he negligently failed to use the highest degree of care to avoid injury to him. But the instruction last referred to was one given in explaining the rule of the last fair chance, and in that connection was entirely proper; at any rate, it was not an instruction of which the appellant can complain. From the connection in which the last mentioned instruction was given, it is clear that the jury could not have been misled into assuming that the instructions were in conflict, and that the former in any way interfered with the proper application of the latter. Each instruction was, so far as the plaintiff was concerned, wholly unobjectionable in the connection in which it was used and must have been understood.

IX. The court instructed the jury as to the standard of care required as to passengers, but it is complained that it failed to instruct as to who is a passenger entitled to such protection. The court did, however,

10. SAME:  
passengers:  
instructions.

correctly instruct as to the duty of the motorman to keep a lookout for persons desiring to become passengers, and to slow down the car and bring it to a stop for the purpose of taking on one wishing to become a passenger and, further, as to whether the deceased, intending to board the car as a passenger, was

guilty of contributory negligence in the method of doing so. From these instructions the jury must have understood that, while the deceased was attempting to board the car as an intended passenger, he was entitled to have exercised in his behalf that high degree of care required to be exercised for the protection of passengers. No further instruction on the subject was asked on behalf of the plaintiff, and the omission of the court to more specifically state the rules of law as to who is a passenger under such circumstances can not properly be made subject of complaint.

X. It appeared that the defendant company had promulgated certain rules for the government of its employees, and one of these was offered in evidence for the plaintiff, the only pertinent portion of which

11. SAME:

company rules:  
violation:  
negligence:  
evidence.

reads as follows: "Motormen must run slowly and with great care over all curves, frogs, switches, crossings, and special track work, holding car well in hand, and applying only such amount of power as may be necessary for its proper propulsion." To this offer the defendant objected on the ground that the rule was incompetent, irrelevant, and immaterial, with reference to the issues for determination by the jury, and without probative force as to the standard of care required to be exercised by the defendant. The claim for appellant is that in general the rules of the company requiring its employees to follow a specific course of conduct in discharging their duty towards their employer may be considered in determining whether the duty of the company towards others who are not employees, and who are without knowledge of such rules and have not acted in any way in reliance upon them, has been observed. On this question there seems to be some conflict in the authorities, although we think that an examination of the cases will show that the conflict is less marked than extracts quoted from the language of the courts used in disposing of the question might lead one to suppose.

In the first place, the duty of the company to make proper rules and regulations in order that its business may be safely conducted for the protection of its own employees is not here involved. If the sufficiency of such rules were in question, they would be, of course, admissible. *Cooper v. Central R. of Iowa*, 44 Iowa, 134. Plainly such rules are also admissible where the question is as to the negligence of a railroad company in so carrying on its operations as to result in the injury of an employee; for the employee must be presumed to have been aware of the method of operation prescribed by the rules promulgated for his guidance and protection, and to have been justified in relying upon their observance. This consideration sufficiently explains the suggestions briefly made by this court in disposing of the case of *Beems v. Chicago, R. I. & P. R. Co.*, 58 Iowa, 150, and on second appeal, 67 Iowa 435. Referring to the conclusions announced by this court in the case last cited, we have said that such rules may be received where the person complaining of the conduct of the company had the right to rely upon them, and that the plaintiff in that action "had a right in the discharge of his duties to rely upon the observance by his coemployees of the rules of the defendant intended for their guidance, of which he must have been presumed to have knowledge." *Hart v. Cedar Rapids & Marion City R. Co.*, 109 Iowa, 631.

In *Coates v. Burlington, C. R. & N. R. Co.*, 62 Iowa 486, in which recovery was asked for injury to a brakeman resulting from his foot being caught in an unblocked frog, an order of the defendant company requiring all frogs to be blocked was held to have been properly admitted, on the ground that the existence of a general order of this character was important as a circumstance, in the nature of an admission that, without some protection, unblocked frogs are dangerous to employees whose duty requires them to go upon the track in close contact with moving trains. The



case is not pertinent to the question now under consideration, for the reason that, in the first place, the question was as to the duty of the company to its employee, and, in the second place, the rule was in fact received in evidence, and, as will be indicated later, a holding that it was not error to receive such offered evidence does not necessarily lead to the conclusion that the rejection of like evidence when offered is necessarily prejudicial error. On the other hand, in *Burg v. C. R. I. & P. R. Co.*, 90 Iowa, 106, 114, it was held that in an action by a trespasser for negligence of the employees of the railway company resulting in injury to him, "rules and regulations adopted by the company for the preservation of its passengers and trains do not apply to trespassers on its road, whose own wrongful and negligent conduct places them in danger, and the only obligation or duty on the part of the company or its employees in such a case is when made aware of the danger to avoid inflicting any injury, if by the exercise of ordinary diligence they could prevent it"; and, having adopted this view in language used by another court, we said that "it is hardly to be doubted that the company had in view in promulgating the rule only such obstructions to the track as might arise from the conduct and management of the road, and not obstructions not in reason to be anticipated," this observation being made with reference to a rule of the defendant company requiring that a sharp lookout be kept "for all work trains, section men, and others who may be obstructing the track."

Referring now to decisions in other states bearing upon the question before us, we find that rules have been held admissible, not only where the action is by an employee who may be presumed, on account of his relations to the company, to have had knowledge of rules made for his protection, and to have relied upon the observance of such rules in the conduct of the company's business, *Meyers v. San Pedro, L. A. & S. L. R. Co.*, 36 Utah 307 (104 Pac.

736, 21 Ann. Cas. 1229), but also where the rules related to the method of operating the trains of one company with reference to like operation of trains of another company, so that the employees of the latter may be presumed to have relied upon the observance of its rules by the employees of the former. *Chicago, M. & St. P. R. Co. v. O'Sullivan*, 143 Ill. 48 (32 N. E. 398). It has also been held that a mail clerk on a train is charged with the same knowledge of the rules of the company for the operation of its trains as an employee, and is therefore entitled to rely on the observance of such rules. *Chicago & A. R. Co. v. Kelly*, 75 Ill. App. 490.

But by what we regard as the decided weight of authority, as well as in accordance with sound reasoning, it has been held that in cases of injury to persons who are not charged with the knowledge of the company's rules, and who have not acted in reliance thereon, the rules of the company for the regulation of the conduct of its employees are not admissible in evidence for the purpose of showing that the company was liable on account of the violation of such rules as constituting negligence. Thus in *Alabama G. S. R. Co. v. Clark*, 136 Ala. 450 (34 South. 917), it was held that in an action against the company for its negligence in the destruction of property due to fire set out by sparks from its engine, it was error to admit in evidence the rules of the company regulating the conduct of its employees in the operation of its engines; the court saying: "By rules adopted for the government of its employees in the management of its internal business, the defendant company could not lessen the degree of care which the law requires, and it would be unreasonable to hold the defendant to a higher degree of care than the law imposes, because in its rules, in order to more thoroughly guard against accidents, it exacted an unusual or extraordinary degree of care of its employees. The rule of the company introduced in evidence over the objection of de-

fendant, and which was made for the government of its employees, required the exercise of a greater degree of care than that of an ordinarily prudent man; it required the exercise of every precaution. This evidence was not without prejudice to the defendant, and its admission was error." In *O'Keefe v. Eighth Ave. R. Co.*, 33 App. Div. 324 (53 N. Y. Supp. 940), it was held not error to refuse to admit in evidence the rules of the company as to the duty of the driver of a street car with respect to the rate of speed to be observed in rounding curves, "because in no way could they (such rules) be binding upon the plaintiff, nor was it material or relevant in answer to the charge that the car in this instance had gone around in a careless manner, and at a high rate of speed, to show that the rules of the company forbid such management of the car while rounding a curve." In the case of *Isackson v. Duluth Street R. Co.*, 75 Minn. 27 (77 N. W. 433), a judgment for the plaintiff on account of injuries received by him while passing along the street due to his being run over by a street car of the defendant was reversed on account of the admission in evidence by the lower court of a rule requiring the motorman to keep a sharp lookout to avoid running into pedestrians; and the court uses this language: "This is a special rule of the defendant company for its motormen to obey, and so designated in the book of rules furnished them by the company, and introduced in evidence by the plaintiff against the objection of the defendant. This rule is evidently intended for the guidance of its own motormen and as a standard of duty to the company on the part of such motormen. But there is not the slightest evidence to show that the plaintiff knew or relied upon it." Rules may be adopted by the company which impose a higher degree of care upon its employees than that imposed by the law itself. Such rules are meritorious, in this: that the stricter the rules are against negligence or wilful misconduct, the more they tend to make the employee

diligent and careful in his management of the car, and thus lessen the dangers which result in personal injuries either to passengers or persons on the track of a railway company. There was no evidence showing or tending to show how long this rule had been in existence, or of any custom based upon it, and, in the absence of knowledge of such custom, plaintiff could not have been influenced by it in his conduct at the time of the injury. See *Terien v. St. Paul City Ry. Co.*, 70 Minn. 532 (73 N. W. 412); *Fonda v. St. Paul City Ry. Co.*, 71 Minn. 438 (74 N. W. 166, 70 Am. St. Rep. 341). The rule required a higher degree of care on the part of the motorman than the law imposed upon the company itself. This case and other cases cited by the same court discussing quite fully the admissibility of rules under such circumstances was fully approved by us in the case of *Hart v. Cedar Rapids & Marion City R. Co.*, already cited, 109 Iowa, 631.

It must be conceded, however, that in *Stevens v. Boston Elevated R. Co.*, 184 Mass. 476 (69 N. E. 338), and *Cincinnati Street R. Co. v. Altemeier*, 60 Ohio St. 10 (53 N. E. 300), it has been held not to be error to receive in evidence in an action for negligence brought by a passenger or a person injured on the streets the rules of a street car company with reference to the management of its cars by its employees. In the Massachusetts case such a rule was said to be analogous to the ordinance of a city regulating the management of street cars and also an indication of the precautions thought necessary for the protection of others in the management of its business; while in the Ohio case the admissibility of the rules was predicated on the thought that they were a part of the *res gestae*, rather than admissions on its part of the degree of care required under the circumstances of the case. It is to be noticed that in each of these cases the rules were admitted in evidence, and the court refused to reverse on that ground, and in the Ohio case it is suggested that no harm could have resulted from

admitting the rules, and that, as they did not require a higher degree of care on the part of the company than the law required, their introduction was not prejudicial. In *Lyman v. Boston & Maine R. R.*, 66 N. H. 200 (20 Atl. 976, 11 L. R. A. 364), it is said that an exception to the admission of rules of the company requiring a wild engine not to be run on crossings over fifteen miles an hour when a red flag had not been sent out on the preceding train required no consideration, the action being for negligence in causing the death of one who was run over by a wild engine at a farm crossing on his own land. But it appears that the rule was admitted in evidence on the theory that the deceased had no notice of the running of a wild engine at a time when no regular train was due; and plainly the view of the court was that deceased had a right to rely on the usual method of operation of the trains unless the signal required by the rules was given on a regular train that an extra engine or train was to follow. One who is accustomed to use a railroad crossing, and especially one who is working about his own land in proximity to the railroad, and using his private crossing in connection with such work, is justified in taking into account the usual operation of trains along the track and the usual signals given of extra trains or engines which may imperil his safety. We think this case is not one which supports appellant's contention in the case now before us.

In *Baltimore & Ohio R. Co. v. State, Use Chambers*, 81 Md. 371 (32 Atl. 201), it was held that, in an action for negligently causing the death of deceased at a railway station by running a train through the station without stopping on a track adjoining that from which the deceased had just dismounted, a rule of the company forbidding the operation of trains in this manner was properly admitted in evidence; the court saying that there was nothing in the record to show that the rule was one for the guidance of the company's employees only, and not

intended for the eye of the public, but that, even if the rule was only intended for the employees of the company, yet, if it was a rule previously complied with, the public was authorized to enforce a continuance of the custom which would result from an observance of the rule, and that, without any rule upon the subject, it was negligence on the part of the company to operate its trains in such manner as would imperil the safety of passengers dismounting from a train. It is plain that in this case the operation of the train which injured the deceased was negligence without regard to any rule, and therefore that the admission of the rule in evidence could not have prejudiced the defendant, for nothing was required by the rule which would not have been required by law. In *Lake Shore & M. S. R. Co. v. Ward*, 135 Ill. 511 (26 N. E. 520), which was also a case of the injury of a passenger who had dismounted from a train at a station, it was held that there was no error in receiving in evidence a rule forbidding their trains or engines on another track passing between the standing train and the station, for the reason that the rule was in the nature of an admission by the company that due care in the running and management of their engines and trains at stations required the course of conduct prescribed by the rule. Here again it is apparent that nothing more was required by the rule than would have been required in the proper operation of trains if no rule on the subject had been in existence, and that the admission of the rule in evidence was in no way prejudicial.

What has been said with reference to the last two preceding cases cited is applicable to the cases of *Georgia R. R. v. Williams*, 74 Ga. 723, and *Atlanta Consol. St. R. Co. v. Bates*, 103 Ga. 333 (30 S. E. 41), in which without discussion, the court refused to reverse on the complaint that a rule of the company had been admitted in evidence which required precautions to be taken by employees in

the operation of trains or cars. In discussing the cases which we have already referred to relating to the admissibility of rules for the government of employees in actions brought for injuries to passengers or others not in the employment of the company, Judge Thompson, in his work on Negligence (volume 6, page 739), says that courts allowing the admission of such rules generally proceed on the theory that their promulgation is a recognition of the necessity of their enforcement to prevent accidents, and that they are a part of the *res gestae*; and he continues: "Another line of decisions refuses such evidence in cases where the plaintiff was ignorant of their existence at the time of receiving his hurt, on the ground that his conduct could not have been in any way influenced by such rules, and for the further reason that a person *can not by the adoption of private rules fix the standard of his duty to other persons*. The reason against the admission of these rules would seem specially strong where they impose a *higher degree of care than the law requires*." The italics are those of the author. It is to be noticed that in none of the cases relied on as authority for the admissibility of such a rule as we are now considering was the court asked to reverse on the ground that the lower court had refused to receive such a rule in evidence. They were all cases in which the rule received in evidence required no higher degree of care on the part of the employees than would have been required by law had no rule on the subject been in existence. It does not follow, therefore, that, if in these cases the court had refused to admit the rules in evidence, a reversal would have been deemed necessary had the judgment been for the company. On the other hand, the cases in which the courts have held such rules to be inadmissible have been cases where either the rule has been rejected and the action of the trial court has been affirmed, or cases in which the rule has been admitted, and

the ruling of the trial court has on that ground been reversed.

That the rule rejected in the case before us was wholly immaterial, and could have been of no assistance to the plaintiff in enabling him to make out a case, is apparent from the fact that, so far as applicable to the case before the court, it simply required the motorman to run his car slowly and with great care over crossings, holding the car well in hand, and applying only such amount of power as might be necessary for its proper propulsion. If plaintiff was entitled to recover at all, such recovery was necessarily predicated on the duty of the defendant toward plaintiff as a passenger; that is, toward one who, for the purpose of being transported on the car as a passenger, was attempting to enter it. But, if the rule could be construed as requiring under the circumstances a higher degree of care in operating the car over the crossing than that required by law, then, as indicated in the cases cited and referred to by Judge Thompson, it was plainly not admissible. It would be unreasonable to say that such a company as the defendant can not prescribe rules for the conduct of its employees without thereby being held to an admission that the failure to observe such rules would be negligence, attributable to it in its relations to other persons, as well as a breach of obligation on the part of the employee to the employer. If such rules are to be so construed, then it would be plainly against the interests of the company to make any rules whatever for fear they could be construed into admission of negligence when violated; whereas, it is equally plain that the company has an interest with reference to the management of the details of its business in prescribing specifically what its employees should do under particular circumstances. Such requirements may well be important in regard to the safety of the company's property and the expedition required in the



transaction of its business without having any bearing whatever on the question of its negligence.

In conclusion it is sufficient to say that having in the case of *Hart v. Cedar Rapids & Marion City R. Co.*, *supra*, 109 Iowa, 631, expressly approved of the reasoning adopted in the Minnesota cases for the exclusion of such a rule when it relates only to the conduct of the company's business by its employees, we are unwilling now to adopt the reasons announced in some other courts in refusing to reverse where a rule has been received in evidence which does not require any higher degree of care than that which would be required had no such rule been in existence.

The decision of the trial court is therefore—*Affirmed*.

DEEMER, J. (dissenting).—If the majority had been content to place the decision upon the ground that no prejudice resulted from the exclusion of defendant's rules, I would not object to the conclusion reached. But, as the opinion proceeds upon the theory that such rules are inadmissible in negligence cases, I must withhold my concurrence. The effect of the decision will be to hold that, if such rules be admitted, prejudice will be presumed, and every subsequent case must be reversed where such rules are admitted in evidence. I do not think this doctrine is sound in principle, or supported by the weight of authority. I believe that such rules as are here involved are promulgated for the safety, not only of passengers, but of all persons rightfully on the streets, and that they are in the nature of an admission by the defendant of the degree of care required for the protection of these persons. If they require more than the law would exact, that matter can easily be covered by instructions. But in the majority of instances, and especially in this case, the rule did not require anything more than the law imposes. My conclusions find support in *Railroad Co. v. Altemeier*, 60 Ohio St. 10 (53 N. E. 300); *Railroad Co. v. Ward*, 135 Ill. 511

(26 N. E. 520); *Railroad Co. v. State*, 81 Md. 371 (32 Atl. 201); *Lyman v. Railroad Co.*, 66 N. H. 200 (20 Atl. 976, 11 L. R. A. 364); *Stevens v. Railroad Co.*, 184 Mass. 476 (69 N. E. 338); *Meyers v. Railroad Co.*, 36 Utah 307 (104 Pac. 736, 21 Ann. Cas. 1229); *Railroad Co. v. Bates*, 103 Ga. 333 (30 S. E. 41); *Railroad Co. v. O'Sullivan*, 143 Ill. 58 (32 N. E. 398); *Railroad Co. v. Williams*, 74 Ga. 734.

WEAVER, J. (dissenting).—I fully concur in the dissent expressed by Mr. Justice Deemer. I take issue upon the proposition that this court has ever before directly or indirectly committed itself to the doctrine of the majority opinion. More than that, but two courts of last resort in this country—the courts of Alabama and Minnesota—have ever shown any leaning in that direction. In the former case cited by the majority the question is passed upon in a brief dogmatic or perfunctory way without citation of authority. In the latter case the opinion is founded solely upon the manifestly unsound assumption that the rules in question were adopted to prescribe the duty of the motorman to the company alone and not to the public, and their disregard by the motorman would be no evidence of negligence in an action by a third person. The same sort of reasoning would exclude the evidence in an action brought by an injured employee, but the majority concede, as do all the cases, that the evidence is admissible in an action of that nature. On the other hand, the Supreme courts of Ohio, Massachusetts, Maryland, Illinois, and Georgia have distinctly held the evidence competent, as is pointed out in the dissent of Deemer, J., and the logical force of the reasoning by which their views are upheld is in my judgment irresistible. I shall not take the time to discuss the cases, except to say that our own decisions on which the majority seem to rely are not in point upon the question before us. The *Burg* case was an action by a tres-

passer, and is so foreign to the issue here presented that I can only express my surprise at its citation. In the *Hart* case the point, although mentioned, was neither involved nor passed upon by the opinion, because it was found that, even if the admission of the evidence was error, it was without prejudice. All the other cases were actions by employees, and it was held the admission of the rules in evidence was not erroneous.

The judgment below ought to be reversed, and a new trial ordered.

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LAURA ARNOLD *et al.*, Appellants, v. EUPHEMIA M. and  
RODERICK G. LIVINGSTON, Appellees.

**Wills: DEVISE TO WIDOW: ELECTION.** A devise to a widow is in the  
1 nature of an offer by the testator in lieu of her distributive share  
under the statute, and is not effectual until she has elected to  
accept the devise.

**Same: TIME FOR MAKING ELECTION.** The statute relating to an election  
2 by a widow to accept the provisions of her husband's will made  
for her benefit fixes no time limit for service of notice upon her  
by those interested in the estate; and in the absence of such notice  
she need not make her election within any particular time or in  
any particular manner.

**Same: MANNER OF ELECTION: EVIDENCE.** Under the present statute  
3 a widow's election to take under her husband's will may be made  
at any time, and may be shown by express words of election, or  
in any other manner in which the intent to elect can be ascer-  
tained. Evidence held to show an election to take under the will  
rather than under the statute.

**Same: EFFECT OF ELECTION.** A widow's election to take under her  
4 husband's will is binding upon her devisees.

*Appeal from Jones District Court.*—HON. W. N.  
TREICHLER, Judge.

SATURDAY, FEBRUARY 15, 1913.

ACTION for admeasurement of dower. Judgment decreed in favor of applicants.—*Reversed*.

*Herrick, Cash & Rhinehart*, for appellants.

*E. E. Reed* and *J. W. Dorsee*, for appellees.

GAYNOR, J.—It appears from the record in this case: That Alexander Livingston died in October, 1907, and at the time of his death was the owner of one hundred and sixty acres of land in Delaware county, and a homestead in Monticello, Iowa. That he left surviving him his widow, Sarah J. Livingston, that he died testate, leaving a will, which after providing for his just debts and funeral expenses reads as follows:

I will, devise and bequeath unto my beloved wife, Sarah J. Livingston, a life interest in all the property of which I may die seized or possessed, or to which I may be entitled, with remainder over as hereinafter described. She shall not have the right of sale except that if it be necessary to make repairs and improvements she may make the same from the proceeds of the sale of personal property, but she shall have the right to occupy or rent all of the land and appropriate unto herself the proceeds or rental only and she may change the character of the personal property, whenever necessary, and reinvest the same or use the personal property sufficient to maintain her in health and sickness if the rental of the real estate is insufficient therefor. This bequest shall be in lieu of her dower or statutory rights. Unto certain of my children I make the following bequest: James H. Livingston, \$1.00; Roderick G. Livingston, \$1.00; John D. Livingston, \$5.00; Alexander B. Livingston, \$5.00; Sarah A. Putnam, \$300.00; Louisa Holcomb, \$300.00; Euphemia Livingston, \$300.00; which shall be paid upon the event of the death of my wife. After the death of my said wife and the payment of all legacies aforesaid, all that remains of my property shall be divided among the following named persons in the following proportions, to wit: Sarah H.

Putnam, one share; Louisa Holcomb, one share; Alice Darling, one-half of one share; Laura Arnold, one share; Archibald Livingston, one share; Euphemia Livingston, one share; Gladys Swift, one-fourth of one share; Edna Swift, one-fourth of one share; Stanley Swift, one-fourth of one share; Esther Swift, one-fourth of one share.

That said will was admitted to probate on the 3d day of December, 1907, and duly probated, and the executor named therein, Howard Putnam, after being duly appointed by the court, duly qualified as required by law, and gave notice of his appointment. That the said Sarah J. Livingston, widow, died testate on the 12th day of March, 1909, and that the petitioners herein, Euphemia M. and Roderick G. Livingston, are the sole legatees and devisees under her will. That the will of the said Sarah J. Livingston was admitted to probate and duly probated on the 2d day of April, 1909.

It is claimed by the applicants herein, Euphemia M. and Roderick G. Livingston, sole devisees under the will of the said Sarah J. Livingston, that the said Sarah J. Livingston did not in any manner elect to take under the will of the said Alexander Livingston, and did not in any manner relinquish her right to her distributive share in the estate of her husband, Alexander Livingston, and at the time of her death she was entitled to a dower interest in his estate and they ask that the same be now admeasured and set off to them as sole devisees under her will. Upon the trial of this cause in the court below it was admitted of record that the said Sarah J. Livingston never appeared in court or made any election before the court in person to accept the provisions of the will, and that she never filed in said court any written acceptance of the provisions of the will, and that no election to take under the will of Alexander Livingston by her was ever made of record in said court.

The questions therefore to be determined are what

were the rights of Sarah J. Livingston to, and what was her interest in, the property of Alexander J. Livingston at the time of the death of the said Sarah J. Livingston, and this must be determined by reference to the statutes in force at the time of her death. Section 3366 of the Code of 1897 provides as follows: "One-third in value of all legal or equitable estates in real property possessed by the husband at any time during the marriage, which have not been sold on execution or other judicial sale, and to which the wife had made no relinquishment of her rights, shall be set off as her property in fee simple, if she survives him." Section 3362 of the same Code provides: "The personal property of the deceased, not necessary for the payment of debts, or otherwise disposed of, shall be distributed to the same persons and in the same proportion as though it were real estate." From these statutes it appears that the said Sarah J. Livingston at the time of her husband's death was entitled to one-third in value of all the legal or equitable estate in real property, possessed by him at the time of his death, being the property in controversy, and one-third of all the personal property owned by him not necessary for the payment of debts or otherwise disposed of, and this became a fixed and absolute right in her immediately upon the death of her husband. Therefore, upon the death of her husband, she had the right to take and hold her distributive share and her homestead rights and exemptions, or to take in lieu thereof the devise made to her in the will, but she could not take both, for, when the widow is named as devisee in the will, it is presumed, unless the contrary appear, that the testator intended the devise to be in lieu of such statutory rights. Section 3270 of the Code 1897. So upon the probate of the will the said Sarah J. Livingston stood in such a position, with relationship to the provisions of the will, and her rights under the statute,

that she might choose or elect to take one or the other as it might seem to her to be for her best interests.

The devise to the widow was in the nature of an offer or tender to her of the thing devised in lieu of her statutory rights, and, being only an offer or tender made to her by her husband in his will, it did not become effectual as to her until accepted by her; that is, until she elected to take the devise in lieu of her other rights.

1. WILLS:  
devise to  
widow:  
election.

The statute does not put any time limit on her right to accept or reject the devise except as found in section 3376, and then only when she is compelled to elect by the others interested in the real estate and forced to make her election of record. Section 3376 of the Code of 1897 provides as follows:

2. SAME:  
time for  
making  
election.

The survivor's share can not be affected by any will of the husband unless consent thereto is given within six months after a copy thereof has been served upon the survivor by the other parties interested in the estate, and notice that such survivor is required to elect whether consent thereto will be given, which consent when given, shall be given in open court or by writing filed therein, which shall be entered on the proper records thereof; but if at the expiration of six months, no such election has been made, it shall be conclusively presumed that such survivor consents to the provisions of the will and elects to take thereunder.

There is no time fixed in the above statute within which "the other parties interested in the estate" are required to serve the widow with notice to elect. There is no limit in the statute on them. The right is given them at any time to force the widow to an election, and to require her to make her election of record, and it is only after this notice has been served upon her that the conclusive presumption arises against her. This statute was undoubtedly enacted for the benefit of the "other parties

interested in the estate," and to enable them to have the rights and interests of the widow definitely determined and fixed, if they so desire, and to force her to elect and to have the same made of record for the protection of those interested in the estate for all future time. In the absence of this notice, the widow is not limited as to time in making her election, nor is she required to make the same in any particular manner. She stands with the right of election; that is, with the right to choose whether she will accept and take the devise tendered her in the will, or whether she will stand upon her statutory rights and take her distributive share, homestead rights, and exemptions.

Election is to choose between rights, or to choose one thing rather than another. The election determines the choice, and this choice may be shown by expressed

2. SAME: words of election, and as in this case the  
manner of actual taking of the thing bequeathed, or it  
election: evidence. may be shown in any other manner that

clearly makes manifest that an election has been made. No homestead rights are in issue here. In this the present statute differs from section 2452 of the Code of 1873, which reads as follows: "The widow's share can not be affected by any will of her husband unless she consents thereto within six months after notice to her of the provisions of the will by the other parties interested in the estate; which consent shall be entered upon the proper records of the court." From this statute it is apparent that, to entitle her to take under the will, she must appear within six months after notice of the provisions of the will and make her election and make it a matter of record, and it was held that, if she did not appear within the six months and make her election and make the same of record, she could not do so afterwards, and was conclusively held to have rejected the provisions of the will.

It is apparent that the foregoing construction of the present statute and of the widow's right of election, and



as to how her election shall be evidenced, is not in harmony with many of the decisions heretofore made by this court, but a close examination of those decisions will disclose that many of them were made under statutes entirely different from those statutes now under consideration. From the above statute of 1873, it will be seen that the share of the widow can not be affected by the will of the husband, and is not affected unless she consents thereto within six months after notice to her of its provisions, and this consent must, by the terms of the statute be entered upon the proper records of the court within six months after she received notice of the provisions of the will. Therefore, under this statute, unless the widow consents to take under the will within six months after notice to her of its provisions and makes this election of record (and it could not be made of record after that time), she is presumed and is held to have rejected the provisions of the will in her favor, and to have elected to take her statutory rights, and it was rightly held that she was barred from taking under the will unless consent thereto was made within six months and entered upon the records of the court. At the time *Newberry v. Newberry*, 114 Iowa, 704, was decided the statute now under consideration was in force, but the point now decided was not decided in that case, for there was no proof that the widow elected to take under the will, and no evidence of any relinquishment of her statutory rights, and the court rightly held that she was not barred from asserting her rights under the statute. It is true that the court cites this statute, and announces the rule that consent to, and acceptance of, the provisions of the will must be made in six months after notice of the will, and that such consent must be made of record, and cites in support of the rule *Houston v. Lane*, 62 Iowa, 291, and *Everett v. Croskrey*, 92 Iowa, 333, but it will be noticed that both these cases were decided under the statute of 1873 (section 2452), and it will

be further noticed in this *Newberry* case that it was not necessary to invoke this rule to reach the conclusion on which the decision is based. *Bailey v. Hughes*, 115 Iowa, 304, was decided while the present statute was in force, but in that case the rights of the widow were fixed before this statute was enacted, and, though the statute under consideration (that is, the present statute) is set out in this opinion, the authority for the holding rests on the decisions of this court made under the statute of 1873. The same is true of *Jones v. Jones*, 137 Iowa, 382, and *Byerly v. Sherman*, 126 Iowa, 447, and this is true of all the decisions relied upon by appellee except some where there was an apparent effort made to bend this statute to conform to the former decisions of this court under different statutes, and instead of making the decision conform to the statute as it now is.

From the foregoing discussion it is apparent that we now hold that the widow may elect to accept the devise at any time, and that this fact can be shown by any competent evidence that satisfies the court that she did so elect before her death, and need not be made within six months; and need not be made a matter of record except as provided in section 3376.

This brings us to the question of fact—did she so elect? It appears that many times between the death of Alexander Livingston and her death the said Sarah J. Livingston stated in the presence of her children that she accepted the provisions of the will and would hold under the will that, if she took her distributive share, the income would not be sufficient to keep her during the remainder of her life; and that she would be able to live on the income of the whole property, that is, the rentals; that she accepted the will, was going to stand by it, and lease the farm. It appears that she did rent the farm, received and appropriated to her own use the entire rental of the farm, besides occupying the home at Monticello until the time

of her death, and was never asked to, and never did, make any account therefor to, or with, the other devisees named in the will.

From the whole record it is apparent that she elected to take under the will and gave all with whom she came in contact a right to believe she so elected; and they did so believe and we find as a matter of fact she did elect; and this election on her part is binding on the devisees in her will, and leaves them without any standing in court.

4- SAME:  
effect of  
election.

There are other questions discussed by counsel, but under the ruling herein made we find it unnecessary to enter into those questions. We therefore hold that the court erred in holding that there was not sufficient competent evidence to warrant a finding under the law that Sarah J. Livingston elected to take under the will of Alexander Livingston, and in holding that the devisees named in the will of Sarah J. Livingston were entitled to a distributive share in the estate of Alexander Livingston; and the case is therefore—*Reversed*.

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WESTERN NEWSPAPER UNION, Appellant, v. CITY OF DES MOINES, A. J. MATHIAS, Mayor, BEN J. NESS, Sheriff of Polk County, Appellees.

**Municipal corporations: VIADUCTS: DAMAGES.** The construction of a viaduct is not such a change of the street grade as precludes a recovery of damages by abutting property owners on account of the obstruction of access to the property, and of light and air; as the statutes expressly provide for damages caused by such improvements.

**Same: DAMAGES: BENEFITS: STATUTES.** Under the statutes relating to recovery of damages by abutting owners for injury caused by the construction of a viaduct, as in the condemnation of property for internal improvement, recovery of damages can not be entirely defeated by a showing of prospective benefits, although such benefits may be considered in determining the damages.

**Same: DAMAGES: OBSTRUCTION OF LIGHT AND AIR.** Where the construction of a viaduct shuts out the light and air from abutting property, which are essential to the use of the property, that fact may be considered in determining the damages to a leasehold estate.

**Same: DAMAGES: EVIDENCE.** On the assessment of damages to abutting property arising from the construction of a viaduct, where it appeared that the city permitted abutting owners to connect their property with the viaduct, refusal to permit a lessee to show that by the terms of his lease he was not permitted to make the changes in the property necessary to make the connection was erroneous.

**Same: EVIDENCE: CONCLUSION.** In the assessment of damages to abutting property caused by the construction of a viaduct, it was erroneous to receive the evidence of witnesses as to the amount of damages, whose conclusions in that regard rested solely upon investigation of viaducts in another city; similarity of the situation in the two cities not being shown.

**Same: EVIDENCE.** On assessment of damages to leasehold property caused by the construction of a viaduct, permission for the city to show whether the leasehold interest was listed for taxation was erroneous.

Evans, J., dissenting in part.

*Appeal from Polk District Court.*—HON. HUGH BRENNAN,  
Judge.

THURSDAY, MARCH 20, 1913.

THE City of Des Moines instituted condemnation proceedings to award the damages to plaintiff's leasehold, due to the construction of a viaduct over certain railway tracks in the City of Des Moines. The defendant sheriff selected a jury, which awarded the plaintiff the sum of \$2,000. From this assessment the City appealed to the District Court, and upon trial to a jury, in that court, a verdict was returned, finding that plaintiff suffered no damages, and a judgment was accordingly entered against it for all of the costs of the proceedings. Plaintiff appeals.—*Reversed.*

*Thos. A. Chesire*, for appellant.

*H. W. Byers* and *R. O. Brennan*, for appellees.

DEEMER, J.—In the year 1903, plaintiff, a corporation, made a fifteen-year lease of a building owned by one F. M. Hubbell, which building was two stories high, with a basement, located upon a lot facing upon West Seventh street, in the city of Des Moines. This building faced east and was sixty feet in width and one hundred and thirty-two in depth, with a subbasement of some height. The lessor agreed to keep the roof and outside walls, which were of brick, in repair, and the lessee was to make all other repairs; aside from this, the lessor reserved the right to make such repairs as he wished. The rental was \$300 per month. Plaintiff occupied the building for a printing plant and used therein presses in the basement, had a stereotyping and printing department, a composing room, and other appliances used for printing newspapers, etc. It used large quantities of print paper, which were delivered to its building, and also considerable quantities of paper were used in its job printing department. These goods, and other material, were delivered by wagon, to and from the building. Seventh street is sixty-six feet wide, and Plum street, immediately north of the building, is a short one and is but thirty-three feet in width.

These proceedings were commenced before the sheriff, some time in the year 1911, and had reference to the proposed construction of a viaduct in Seventh street, crossing over a number of railway tracks to the south. By the proposed plan, the viaduct was to commence at Mulberry street, being a block north of the property which plaintiff occupied, and extending southward, gradually rising from Mulberry, and extending for something like eighteen hundred feet. The grade of the approach, from Mulberry street to the south, was five and nine-tenths feet to every

one hundred feet in length, and this approach had concrete retaining walls which were filled with earth and were finally covered with concrete. The west wall of this viaduct was twelve and a half feet from the east wall of the building which plaintiff was occupying, and at the north line of Plum street, which is just north of plaintiff's property, was nine and one-half feet in height above the then present roadway. The entire width of the viaduct was forty-one feet, leaving but twenty-five feet, or twelve and one-half feet on either side, between the walls of the viaduct and the lot lines on either side of the street. Openings were left in the viaduct at Plum street, which were thirty-five feet in width, save that there were piers, subdividing this opening, which were two feet square, leaving but thirty-three-foot openings through the viaduct. It was contemplated that these openings should be fourteen feet high at the south side of Plum street, thirteen feet at the center, and twelve feet at the north side; but this would necessitate a changing of the grade of Plum street, by depressing it, at its intersection with Seventh street, and at the time of trial it was not known just how much this depression would be. But, as we understand it, the plans contemplated a depression of five feet at this point, thus throwing the sidewalk grade out of joint, on both the east and west side of Seventh street, to the extent indicated, which would have to be taken care of, by a like depression of the street, for considerable distances on either side of Plum street, or by stairways or steps. In other words, the opening through the viaduct could not be used for practical purposes, without the depression of Plum street as already contemplated, and until it (Plum street) was depressed this viaduct practically closed Plum street at its intersection with Seventh. The viaduct occupied so much of the street that it was impossible for teams to pass, longitudinally thereon, on either side of the retaining walls, without driving on the sidewalks, and while

footmen might pass along the old sidewalks as they were, subject to change of the contour of the streets, they had to take the hazards of crossing all the railway tracks at grade, or at intervals taking steps leading up to the viaduct. The nearest one of these steps was sixty or seventy feet south of the building which plaintiff was occupying, and the stairway leading from the street to the viaduct at this point was six feet in width. The part of the viaduct fit for travel, in front of the building which plaintiff occupied, was thirty-six feet in width, inside the coping, and upon this a double-tracked street railway track was to be laid, which would occupy fifteen feet, in width, leaving ten and one-half feet on either side for wagon and foot passenger traffic. Plaintiff claims that its means of ingress and egress to the building has been seriously interfered with; that light and air have been cut off from the basement and first story of the building; and that the rental value of the property has otherwise been materially diminished and destroyed; and it introduced various witnesses, who testified to a damage of from \$1,000 to \$1,500 per year. Defendant offered other witnesses, who testified that the construction of the viaduct was no damage to the property, and some of them said it was a real benefit.

The jury found a general verdict for the city, which, interpreted, means that it found there was no loss in the rental value of the building by the construction of the viaduct. If the case stood upon the testimony alone, we would probably not be justified in interfering, for the verdict has support in the testimony and the facts in such cases are peculiarly for a jury. But plaintiff relies upon many alleged errors committed by the trial court—to be exact, forty-two in number. Of course, not all of these are argued, and the main propositions are grouped under headings, which very much reduce the number of assignments. We shall not pass upon all of these, however, for to do so would unduly extend this opinion, and shall confine our-

selves to a consideration of the more important and controlling propositions. At the outset, we may say that the arguments, filed by the respective counsel, are inapposite and unrelated.

In an able and learned argument for the city, counsel contend that the erection of an elevated viaduct over, or along, a street for the purpose of general public travel, and dedicated to public use, is the equivalent of a street improvement, or change in a city grade, and that a land or lot owner, abutting on such street, is not entitled to any damages for the impairment of access to his property or for being deprived of light or air; and they cite many cases in support of this proposition, among them being *Willis v. Winona City*, 59 Minn. 27 (60 N. W. 814, 26 L. R. A. 142); *Brand v. Multnomah County*, 38 Or. 79 (60 Pac. 390, 62 Pac. 209, 50 L. R. A. 389, 84 Am. St. Rep. 772); *Mead v. Portland*, 45 Or. 1 (76 Pac. 347; s. c., 200 U. S. 148, 26 Sup. Ct. 171, 50 L. Ed. 413); *Sears v. Crocker*, 184 Mass. 586 (69 N. E. 327, 100 Am. St. Rep. 577); *Talcott v. City*, 134 Iowa, 113; *Sauer v. New York*, 206 U. S. 536 (27 Sup. Ct. 686, 51 L. Ed. 1176); *Colclough v. City*, 92 Wis. 182 (65 N. W. 1039); *Home Building Co. v. City*, 91 Va. 52 (20 S. E. 895, 27 L. R. A. 551), and cases cited. In other words, they liken this case to one of change of grade and broadly contend that plaintiff's property was not taken for public use; that, if any damages are to be awarded, they are upon the theory that the grade has been changed; and that in such cases benefits may be considered, and no allowance may be made for deprivation of light or air. This, in part, meets the objections made by appellant's counsel to various rulings made by the trial court, and, were it not for certain statutes and decisions of this court in previous cases, the argument filed for appellee would be quite persuasive.

In view of these statutes and decisions, we are not



convinced that appellee's argument is entirely responsive to the case made for appellant. Sections 771 and 771-a of the Code Supplement, as now amended, read as follows:

Sec. 771. When a viaduct shall be by ordinance declared necessary for the safety and protection of the public, the council shall provide for appraising, assessing and determining the damages which may be caused to any property by reason of the construction of the same and its approaches. The proceedings for such purpose shall be the same as are provided in case of taking private property for works of internal improvement, and the damages assessed shall be paid by the city out of the general bridge fund, or in cities having a population of twelve thousand, or over, from any other fund or funds legally available therefor.

Sec. 771-a. In cities having a population of twelve thousand or over, where a viaduct is required to be constructed, and the plans therefor have been approved, and there are no available funds in the general bridge fund, or any fund or funds of said city which may be legally used for the payment of such damages, such city may levy an annual tax not exceeding two mills on the dollar for the purpose of creating a fund to be known as a "viaduct fund," for the payment of damages caused to property by reason of the construction of such viaduct and approaches thereto.

It will be noted that the proceedings are to be the same as are provided for the taking of private property for works of internal improvement and have no reference whatever to proceedings incident to the change of grade of streets and alleys. The proceedings incident to the taking of private property are, so far as material, as follows:

Sec. 1999. If the owner of any real estate necessary to be taken for either of the purposes mentioned in this chapter refuses to grant the right of way or other necessary interest in said real estate required for such purposes, or if the owner and the corporation can not agree upon the compensation to be paid for the same, the sheriff of the county in which such real estate may be situated shall upon

written application of either party, appoint six freeholders of said county, not interested in the same or a like question, who shall inspect said real estate, and assess the damages which said owner will sustain by the appropriation of his land for the use of said corporation, and make report in writing to the sheriff of said county. . . .

Sec. 2000. The freeholders appointed shall be the commissioners to assess all damages to the owners of real estate in said county, and said corporation, or the owner of any land therein. . . .

Sec. 2004. At the time fixed for either of the aforesaid notices, the appraisement of the lands described may be made and returned; but the appraisement and return may be in parcels larger than forty acres belonging to one person and lying in one tract. . . .

Sec. 2009. Either party may appeal from such assessment to the district court, within thirty days after the assessment is made, by giving the adverse party, or, if such party is the corporation, its agent or attorney, and the sheriff notice in writing that such appeal has been taken.

Sec. 2011. . . . The amount of damages shall be ascertained and entered of record, and if no money has been paid or deposited with the sheriff, the corporation shall pay the amount so ascertained, or deposit the same with the sheriff, before entering upon the premises. Should the corporation decline to take the property and pay the damages awarded on final determination of the appeal, then it shall pay, in addition to the costs and damages actually suffered by the land owner, reasonable attorney's fees, to be taxed by the court.

Under these provisions, construed with reference to section 18 of article 1 of the Constitution, it is held that the benefits to the property, by reason of the improvement, can not be taken into consideration. *Fred-*

a. SAME:  
damages: bene-  
fits: statutes.

*erick v. Shane*, 32 Iowa, 254; *Bland v. Hix-*  
*enbaugh*, 39 Iowa, 532; *Britton v. Railroad*  
*Co.*, 59 Iowa, 540; *Sater v. Road Co.*, 1 Iowa,  
386. On the other hand, it is held that the mere  
change of the grade of a street, under statutes author-

izing the same, is not such a taking of private property as that benefits, arising to property abutting thereon, may not be considered. *Stewart v. City*, 84 Iowa, 61. But it has also been held that the laying of a railway track upon the street of a city is an additional servitude, and that compensation in such cases must be awarded abutting property owners—this doubtless by reason of a statute so providing. See Code, sec. 767. In construing this latter statute, which is much like the viaduct statute now under consideration, we said, in *Enos v. Railroad*, 78 Iowa, 31:

Counsel insist that, as the plaintiff's lot was subject to inundation from high water, the embankment on which the railroad track was laid, being above high water, would not have been an injury to plaintiff. Doubtless the embankment, under some circumstances connected with inundation, would not have been an injury, or so great an injury as it would have been were the lot not subject to inundation. But it can not be rightly claimed, because of the fact that plaintiff's lot is low, that he can not recover at all for the construction of the railroad. The question as to the height of the embankment, the fact that the lot was subject to inundation, and all circumstances of the case, were submitted, by an instruction, to the jury's consideration in determining plaintiff's damages.

If we understand this holding, it is to the effect that, while benefits may be considered, they should not be permitted to entirely preclude a recovery. It is certainly true that under the viaduct statutes quoted, abutting property owners are entitled to damages for the construction of viaducts, and their approaches, in the streets, and that entirely consequential and remote or speculative benefits can not be considered. And, in no event, should the supposed benefits be permitted to entirely deprive the property owner, or a lessee, of all damages. It is true that the statutes are somewhat obscure, and that we have nothing but analogies for our guide; but, as the proceedings are with reference to works of internal improvement and not

assimilated to those provided for change of grade, we think it clear that, as a rule, it is incompetent to show no damages because of remote and prospective benefits, due to the construction of the viaduct. Even where damages are awarded for change of grade, the test generally is the difference in the value of the property, or, if it be a leasehold, the difference in value of the use of the property immediately before and immediately after the change of grade, and, as already stated, immediate resulting benefits may be considered, and if these are more than the damages, then no recovery may be had. *McCash v. Burlington*, 72 Iowa, 26; *Meyer v. City*, 52 Iowa, 560. In other words, if some improvement is necessary, as by filling of the lots or otherwise, the benefits can not be said to be equal to the damage. *Preston v. City*, 95 Iowa, 71; *Thompson v. Keokuk*, 61 Iowa, 187. We are constrained to hold that benefits may be considered to the extent indicated, but not farther.

As to the obstruction of light and air: While it is true, perhaps, that an owner may not, under our law, complain of the shutting off thereof, it seems quite clear to us that such facts may be considered in determining the damages done to a leasehold, where air and light are essential to the prosecution of the business. This seems to be the holding in numerous cases. See *Turner v. Sheffield R. R.*, 10 M. & W. 425; *Stack v. City*, 85 Ill. 377 (28 Am. Rep. 619); *Rose v. Stewart*, 77 Hun, 306 (28 N. Y. Supp. 318); *Nordlinger v. Railway Co.*, 77 Hun, 311 (28 N. Y. Supp. 361). Under our present holdings, abutting property owners may have damages for the vacation of a street. *Ridgeway v. City*, 139 Iowa, 590; *Long v. Wilson*, 119 Iowa, 267; *Borghart v. City*, 126 Iowa, 313. In the instant case, the street was practically vacated, in so far as plaintiff was concerned, and the witnesses who testified for plaintiff were justified in taking that into account. More-

3. SAME:  
damages:  
obstruction of  
light and air.

over, the city proceeded under sections 771 and 771-a of the Code Supplement, before quoted, and these provide for assessing, appraising, and determining the damages caused to any property by reason of the construction of the viaduct; the proceedings to be the same as provided in taking property for works of internal improvement. We are not convinced that benefits may not be considered, but they must be such as result directly from the improvement, and not indirectly or remotely or speculatively therefrom. What we have said answers the first general propositions relied upon for appellants, and will be a guide for the retrial of the case.

II. We have given, in a general way, the terms of plaintiff's lease and found that plaintiff had no right to make any changes in the exterior of the building, yet the

trial court permitted the defendant to prove  
4. SAME: damages: evidence. that, by ordinance or resolution, it had granted the right to property owners along Seventh street to connect with the viaduct, by building approaches, bridges, or connections therewith, from their buildings, so as to enable customers to go from the viaduct, directly, into the building, or to haul loads to and from the same. In view of this, plaintiff sought to show whether or not defendant's witnesses took this into account in estimating the damages to the leasehold. But this they were not permitted to do. In this, we think, there was manifest error. Plaintiff could neither construct these approaches nor compel their landlord to do so during the term of the lease, and that fact should have been called to the attention of the jury and witnesses should have been permitted to be cross-examined with reference thereto. These propositions are very fundamental.

III. The court also erred in admitting the proceedings before the Railroad Commissioners of the state, but the error here seems to us to have been nonprejudicial.

IV. Some of the defendant's witnesses based their

conclusions of no damage upon an investigation of the effects of the construction of viaducts upon abutting property, and one said that his conclusion was

5. SAME:  
evidence:  
conclusion. bottomed upon what he found in that respect in another city. It seems to us that this

was an insufficient basis upon which to form an opinion. The situation, in the two cities, was not shown to be the same, and the investigation had reference, not to immediate results, but to final advantages, after various connections were made, by bridges, approaches, etc., and after business had adjusted itself to the new conditions.

V. This question was put to another witness, and, over objections, he was permitted to answer it: "Now, Mr. Sani, assuming that the property owner and the tenant would have the right to use that approach and to connect the building by bridge or approach to this regular approach to the viaduct, is there any practical way, and, if so, tell the jury in what manner, a bridge or approach might be used for the purpose of getting merchandise into this building on the Seventh street side?" For reasons already stated, the objection should have been sustained.

VI. One of plaintiff's witnesses was asked as to whether or not he had ever listed, with the assessor, any leasehold interest held by plaintiff company. Assuming that it was the duty of the witness to do so, which is not shown, we think the question was highly improper and prejudicial.

VII. Plaintiff's request that the jury be instructed to disregard the ordinance, or resolution, permitting abutting property owners to connect with the  
6. SAME:  
evidence. viaduct, by approaches or bridges, should have been given.

Some support is to be found for our conclusions in *Globe Co. v. City*, 156 Iowa, 267.

For the errors pointed out, the judgment must be, and it is, *Reversed*.

EVANS, J. (dissenting in part).—I. I agree with the opinion that benefits to the property may be considered in this class of actions. The constitutional prohibition against consideration of benefits has no application thereto. I see no legal reason, however, for holding “that, while benefits may be considered, they should not be permitted to entirely preclude a recovery, . . . and that in no event should the supposed benefits be permitted to entirely deprive the property owner or a lessee of all damages.” The foregoing quotation is from the opinion. Authority for this holding is claimed in *Enos v. Railway Co.*, 78 Iowa, 31. The opinion in that case is quoted by the majority, and I can see nothing therein which supports this proposition. The usual tendency of street improvement is to benefit adjoining property. And this is so even though in a given case there may be incidental damage. If the damage be small and the direct benefit be great, why should it be forbidden to apply the benefit to the extinction of the damage? If it may be applied to a part of the damage, why not to the whole, if the evidence justifies it?

II. I disagree with paragraphs 5 and 7 of the opinion. The methods by which adjoining occupants could avail themselves of the improvement would ordinarily be proper for the consideration of the jury in any case. Such evidence would not be rendered inadmissible by the peculiarities of plaintiff's contract with its landlord. Such contract was itself a matter of proof by plaintiff. The city acted in conformity to the statute. It violated no right of plaintiff. The plaintiff's right of damages, if any, is statutory. The city was bound to furnish equal facilities for use of the improvement to all adjoining occupants. It could not legally do less for one than for another; neither could it do more. If evidence of such equal facilities is admissible in one case, it is for the same reason admissible in all.

STATE OF IOWA, Appellee, v. CLIFFORD WILSON, Appellant.

**Criminal law: MURDER: EXPERT EVIDENCE.** Under the record in this  
1 case it was not improper to permit a medical expert to state his  
belief, rather than his opinion, that deceased could not have walked  
from one room to another after he was shot the first time; it  
being a legitimate matter of expert testimony, and the inquiry  
calling for the judgment or opinion of the witness as a physician.

**Same.** Where there was evidence that difficulty in establishing a cir-  
2 culation through the veins and arteries when embalming a body,  
would indicate that a large artery of the chest was open, the evi-  
dence of an experienced undertaker that the chest of the deceased  
had to be filled before circulation could be established, and that  
such fact indicated a break in the main artery, was admissible as  
expert evidence.

**Same: MURDER: PUNISHMENT: INSTRUCTIONS.** In defining murder  
3 in the first degree the court should include a statement of the  
punishment, which is to be fixed by the jury; but this is not  
required in defining murder in the second degree, or manslaughter.  
Where, however, the court defined second degree murder in the  
language of the statute, which includes the punishment, but made  
no reference to the punishment for manslaughter, no prejudice  
resulted to defendant; as the jury must have understood from  
the instructions that manslaughter is a lower offense than murder  
in the second degree, and that conviction for the latter offense  
would result in greater punishment.

**Same: MALICE: PRESUMPTION: INSTRUCTION.** Where there was no  
4 claim that defendant was justified in killing deceased, but he  
relied upon the defense that the killing was done by another, an  
instruction that when it is shown that the killing was wilfully  
and purposely done in pursuance of a previous design malice is  
conclusively implied was not prejudicial, though erroneous in  
omitting to declare the right to rebut the presumption; there  
being no evidence which could have rebutted the presumption.

**Same: CAUTIONARY INSTRUCTIONS.** The propriety of a cautionary in-  
5 struction concerning the duty of the jury rests largely in the  
discretion of the court, and where nothing appears to suggest its  
inappropriateness error can not be predicated upon the giving of  
such an instruction. Thus an instruction in a prosecution for



murder warning the jury against an arbitrary exercise of its power to convict of a lesser offense, or to acquit, was not inappropriate in the instant case.

**Evidence:** SUFFICIENCY OF OBJECTION. The general objection that 6 testimony is incompetent, irrelevant and immaterial is not sufficiently specific to present the objection on appeal that the evidence was inadmissible as hearsay.

**Same:** RES GESTAE. Where it was developed on the cross-examination 7 of a witness for the state that he had made certain statements to the coroner immediately before the killing of deceased, further statements of the witness made in continuation of the same conversation were admissible as *res gestae*.

**Same:** IMPEACHMENT EVIDENCE. Where defendant testified that he 8 went to the home of deceased for the purpose of obtaining money to visit a lady friend, it was competent, for the purpose of impeachment to show that a short time previously he had made statements to a third person indicating that the woman in question was not of good character; the evidence not being offered as an attack upon the character of one of defendant's witnesses.

**Same.** A witness can not ordinarily be contradicted as to collateral 9 and immaterial matters brought out on cross-examination, but the court in its discretion may permit the contradiction of the statements of one accused of murder, in which he gave his reasons for visiting the home of deceased where he was killed.

**Criminal law:** MURDER: EVIDENCE: SUFFICIENCY. The evidence on 10 this prosecution is reviewed and held to support the conviction of defendant for murder in the second degree.

**New trial:** ARGUMENT: EXCEPTIONS. Exception to the closing argu- 11 ment of counsel for the state, when raised for the first time in a motion for new trial, comes too late for consideration on appeal.

**Same.** It is the duty of counsel for the state and for defendant to 12 confine their argument to matters appearing in the record, and it is the duty of the court by proper discipline to keep them within legitimate bounds; but the closing argument for the state will not be held erroneous even though outside the record, where it was invited by improper argument for defendant.

**Same.** Where a picture of the room in which deceased was killed 13 was offered in evidence, and defendant's counsel claimed in argument that because some of the witnesses did not see defendant's hat in the room that it was not there, the fact that counsel for the state, to meet this argument, contended that the hat was about the color of the floor, and threw it upon the floor of the court

room for comparison, was not improper, even though no witness testified to the color of the floor of the house; as the picture of the room and the hat were both before the jury from which they could determine for themselves the correctness of counsel's conclusion.

**Same.** Where defendant's hat was offered in evidence, which some 14 of the witnesses testified was in the room where deceased was killed, it was permissible for counsel for the state to argue that certain spots on the hat were blood spots.

**New trial: PREJUDICE.** The denial of a new trial for alleged improper argument will not be disturbed on appeal, unless it appears that the ruling was so prejudicial as to deprive the defendant of a fair trial.

**Appeal: ABSTRACT OF EVIDENCE.** Ordinarily the practice of setting out 16 the whole testimony by question and answer in an abstract is improper.

*Appeal from Calhoun District Court.*—HON. M. E. HUTCHISON, Judge.

TUESDAY, MAY 6, 1913.

THE defendant was indicted with one Roy Mertens for murder in the first degree. The indictment was in three counts—the first count was in the ordinary form, charging first degree murder; the second charged that the killing was done at a time when defendants were engaged in the perpetration or attempt to perpetrate a burglary; and the third charged that defendants broke and entered the dwelling house of James White with intent to commit a public offense, to wit, larceny and robbery. Separate trials were had. This is the second trial of the case as to this defendant. The first trial was had in Sac county, and resulted in a disagreement of the jury. A change of venue was then taken to Calhoun county, and defendant was convicted of murder of the second degree. He was sentenced to the penitentiary for life, and appeals.—*Affirmed.*

*W. H. Hart, E. C. Stevenson and Faville & Whitney,*  
for appellant.

*George Cosson, Attorney General, John Fletcher, As-*  
*sistant Attorney General, and W. A. Helsell,* for appellee.

PRESTON, J.—About midnight of May 29, or early in the morning of May 30, 1911, James White and his son, Matthew White, were killed within a few minutes of each other in the home of the father. The pistol shots which caused their death were fired by defendant Wilson, or his codefendant, Mertens. They were jointly indicted for the killing of the senior White. Defendant admits he went to the house with Mertens, but denies that he was inside where the shooting took place.

The coroner, Dr. Townsend, who was also a physician and surgeon, arrived at the scene about 2 o'clock in the morning of May 30th, and found the old gentleman lying on his back, on the floor in the sitting room, dead. Matthew was lying on the kitchen floor, dead. The sitting room is designated on the plat used in evidence as "A" and the kitchen as "D." There were two bullet wounds in the body of James. The coroner, Dr. Townsend, described the wounds, and gave it as his opinion that both were fatal, and that one of them was instantly so. In one of the wounds as described the bullet entered the left arm about two and one-half inches below the shoulder, passed directly through the body and through the skin of the right arm on a due level through the body. There were vital organs in the line where the bullet would likely touch. In the other the bullet entered the left chest three inches to the left of the median line between the first and second ribs, and passed through and out at the upper angle of the shoulder blade.

William White, another son of deceased, who claims to have seen this defendant fire the shots, testified that said

deceased was in the sitting room when shot, that defendant pointed the pistol at deceased, and that deceased fell to the floor at the first shot, and that the second shot was fired when deceased was down. So that there was direct evidence, and some other circumstances, tending to show that deceased was shot while in the sitting room. Defendant's counsel claim there were some circumstances tending to show that deceased was in the kitchen when he was shot, and that, if this is so, William could not from his position have seen the shooting, or at least the first shot.

There were three wounds on the body of Matthew. Some of the witnesses say there were five shots altogether, and others say six. It was an important question whether James White was in the sitting room or in the kitchen when he was shot. On reexamination Dr. Townsend was asked:

1. CRIMINAL LAW:  
murder:  
expert  
evidence.

Q. As a matter of the knowledge of a doctor and the knowledge of the wound which you examined, do you believe it was a physical possibility for Mr. White, after he received the second shot, or the first shot, or whatever it was which went through his breast and through his two arms, to have walked from room "A" into room "D" to room "A" and fallen on his back? (The defendant objected as not proper redirect examination, incompetent, irrelevant, and immaterial, calling for the belief of this witness, and as seeking to cross-examine his own witness, and it is seeking also to invade the province of the jury, the question of the belief of this witness is wholly immaterial. Overruled, and exception.)

A. It was my belief that he never could have walked from that kitchen. Q. You don't believe that he could ever have walked from that kitchen to that room and fallen where you found him after that second shot went through? (Same objection, ruling and exception.) A. That is my belief.

The argument here is that the court erred in permitting the witness to state his belief, and urges that the manner in which the question was asked permitted the witness to in effect step into the jury box and express his

belief whether deceased was shot in the kitchen, or in the sitting room. If the question was as to whether the witness could have been asked where deceased was when shot, there would have been force in the objection. The fact is the witness did testify, on recross-examination, and without objection, that it was his belief that deceased was in the kitchen when the shot was first fired, and went to the sitting room where he was shot the second time. This was favorable to defendant; that being his claim. Witness also testified without objection to his belief that the shot where the bullet went through the body between the second and third ribs was the first shot. He also said it was a mere matter of guesswork, and that he did not know where deceased was when shot. His belief that deceased was first shot when in the kitchen seems to be based on the assumption that a bullet found in the wall in the kitchen passed through the body of deceased. The question here complained of did not ask for the belief or opinion of the witness as to where deceased was when shot, but whether with such a wound, deceased could, in the opinion of the witness, have gone from the kitchen to the sitting room as an aid to the jury in determining the fact as to where deceased was. This question did not ask for the ultimate fact. The witness qualified as an expert; and, while the word "belief" is used, we think it is clear that he was giving his opinion, and the question asked for his judgment or opinion as a physician. In *State v. Harris*, 97 Iowa, 407, the word "belief" in an instruction was criticised. The instruction defining reasonable doubt stated, in effect, that, if the evidence created in the minds of the jurors a belief in defendant's guilt, they would not have a reasonable doubt that he was guilty. The court said this was not necessarily true. That a person may entertain a belief in regard to a matter which is not sufficiently firm to exclude all reasonable doubt. The statement in the instruction was qualified by other language, so that, while

the instruction was criticised, the case was not reversed. While the use of the word "belief" in an instruction, such as that, is subject to criticism, it has no application here. In some cases a witness may testify as to his belief. Lawson, Expert on Opinion Evidence, 598; Jones on Evidence (Pocket Ed.) section 170; *Chew v. O'Hara*, 110 Iowa, 81. But these cases do not apply here, for the reason, as we have already said, the question called for the opinion of an expert, and his answer was his opinion. But it is said by appellant that, if the doctor was an expert, the question and answer allowed the witness to invade the province of the jury, and cites *Sever v. Railway*, 156 Iowa, 664. The rule is there stated and the cases collated. In that case the question propounded to the witness required him to enter the domain of the jury, and pass upon one of the ultimate facts. We think this is not so in this case. The witness had testified that in his opinion when deceased received the bullet that went through the body and arms he dropped; that it was instantly fatal, and the question now under consideration simply called for his opinion whether with such a wound he could walk from one room to another. This was perfectly proper, and there was no error at this point. Under the circumstances here shown, "the nice philological distinction between the words 'opinion' and 'belief' are too subtle and refined to form a basis on which to ground substantial justice." *Day v. Southwell*, 3 Wis. 657, 661.

II. Dr. Townsend testified, without objection, that when they embalm a body they establish a circulation through the veinous system; and, if any difficulty arises in establishing it until the chest is filled with the fluid, it would show that there was a large artery open in the chest. Witness Temple testified that he had been an undertaker for ten years, and had had considerable experience; that he embalmed the body of James White by taking up an artery in the arm, and

a. SAME.

forcing embalming liquid through the arterial system; that when he started to inject the fluid the chest cavity filled up and stopped the circulation. Thereupon, this question was asked him: "Q. As borne out by your experience, what did that show you? (Defendant objected as calling for the opinion and conclusion of the witness, and that no proper foundation had been laid. The objection was overruled, and the witness answered.) A. There must have been a main artery cut, or an incision in a main artery. Before I could get any circulation, I had to fill the chest of James White full." It is said that no sufficient foundation was laid; that the witness was no more competent to tell what the action of the embalming fluid would be than any other person would have been. It is true that there had been no post mortem on the body, so that it could be told certainly whether an artery had been cut by the bullet. The doctor had testified to substantially the same thing. The witness Temple was an undertaker of ten years' experience. It had been shown by the evidence that the bullet, or one of them, had passed directly through the body of deceased, and that vital organs would be in the path of the bullet. The evidence did tend to show, or at least was a circumstance bearing on the question as to, whether deceased was shot and had fallen in the sitting room; we think the foundation was sufficient, and that the evidence was properly admitted.

III. In defining first degree murder the court quoted the statute, including the punishment. This was proper, and in fact necessary as to first degree, as the punishment is to be fixed by the jury. In defining second degree murder, the court said: "Defining murder in the second degree the statute is: 'Whoever commits murder otherwise than as set forth in the preceding section, is guilty of murder in the second degree, and shall be punished by imprisonment in the penitentiary for life, or for a term not less than ten

3. SAME: murder:  
punishment:  
instructions.

years.'” But the court did not state the punishment for manslaughter. Defendant complains of this, and says that the court should not have mentioned the punishment for second degree murder. No cases are cited by either defendant or the state on this proposition. Our experience is that such an objection is usually made by the state, as in *State v. McGhvey*, 153 Iowa, 308. The purpose of the defense in referring to the severity of the punishment in argument to the jury is apparent. It was not necessary for the court to refer to the punishment for second degree murder, as the jury had nothing to do with that. It would have been as well to have omitted it. But, if there was any error, it was favorable to the defendant. The jurors must have understood from the instructions that manslaughter was a lower degree of the offense charged than murder of the second degree. They knew that, if their verdict was for murder of the second degree, the punishment would be at least ten years, and might be for life. The tendency would be perhaps for the jury to have some sympathy for defendant (a young man, who, as his counsel claimed, had fallen in with Mertens, a hardened criminal), and reduce the verdict to the lower degree.

When the offense is statutory, the definition of the crime may be given in the exact words of the statute. 12 Cyc. 614. This is what the court did here. Merely reading to the jury the statute which fixes the punishment is not error. 12 Cyc. 641, 642; *People v. Henderson*, 28 Cal. 465; *Commonwealth v. Harris*, 168 Pa. 619 (32 Atl. 92); *Miller v. Commonwealth* (Va.), 21 S. E. 499.

There was no error in not stating the punishment for manslaughter. The court is not required to do so. *Currier v. State*, 157 Ind. 114 (60 N. E. 1023).

IV. Instruction No. 14 is complained of. In it, after defining malice as applied to the circumstances of this case, the court said:



. . . This malice may be either express or implied. When the killing is done with a sedate, deliberate mind, and in pursuance of a design previously formed, the malice is express. Under such circumstances, the presumption of malice is conclusive. . . . When the killing is shown to have been wilfully and purposely done, unless the evidence which establishes the killing also shows some circumstances or infirmities which excused the act or mitigated the degree of guilt, the law implies malice. That is, that upon such a state of facts a legal presumption arises that the act was done with that degree of malice which makes the crime murder, but such presumption is not conclusive; it may be rebutted by proof that the party acted under such circumstances of necessity or infirmity as excused the killing or mitigated the degree of the crime.

In instruction 18 the jury were correctly instructed as to the presumption of malice from the use of a deadly weapon in a deadly manner, without legal excuse. It is

4. SAME: malice: presumption: instruction. urged by counsel that, under the first part of the instruction just quoted, the presumption

of malice that arises from the killing and the doing of the act "with sedate and deliberate mind and in pursuance of a design previously formed to kill" is always a rebuttable presumption; that a man may kill another and do the act with a sedate and deliberate mind, and in pursuance of a previously formed design to kill, and still do it all in self-defense. The instruction must be considered in the light of the evidence. Defendant did not claim that he acted in self-defense. His only defense was that he did not do the shooting, and that he was not concerned therein. We are unable to see how a person with hatred, ill will, or hostility towards another, or with a feeling of revenge or enmity against him, there being no evidence or claim or excuse or justification, can rebut the presumption of malice, where the killing is done with a sedate, deliberate mind, and in pursuance of a design previously formed. Under this instruction, the jury were required to first find that the killing was so done before it

could be said that the presumption of malice is conclusive. In *State v. Townsend*, 66 Iowa, 746, the court instructed that malice is proved by the selection and use of a deadly weapon. This court held that to be error because that fact alone did not prove or establish malice, but merely raised a presumption of malice, which may be rebutted. The instruction in the case at bar does not say that the use of a deadly weapon makes such a presumption conclusive, but the deliberate killing, in pursuance of a previously formed design, with a feeling of hostility, revenge, and the like, does have that effect; that is, such facts do show and are express malice. The latter part of the instruction refers to implied malice.

In *State v. Hayden*, 131 Iowa, 1, where insanity and self-defense were claimed, the court said: "The rule almost everywhere is that from the mere fact of killing the inference of malice arises; the burden being on the prosecution to raise it to murder in the first degree, and on the defense to reduce it to manslaughter. Of course, we do not mean to say that a jury should ever be instructed that the burden is upon a defendant to show want of malice. We use the above expression for want of a better term in which to convey the thought. What we mean is that an unexplained killing with a deadly weapon is evidence of malice, and that the burden is on the accused in that sense that he must make proof of legal excuse, justification, or extenuation, or take the risk of a conviction upon the presumption or inference of malice." See, also, *State v. Curtis*, 70 Mo. 594. In *State v. Becker*, 9 Houst. (Del.) 411 (33 Atl. 178), it is held that, where the person who slays another does it deliberately—that is, with a design to kill him, and without the existence of any circumstances which in law are a justification or excuse—he is guilty of murder of the first degree; he is said to have acted with express malice. See note to 38 L. R. A. (N. S.) 1084-1087; 21 Cyc. 707. In this case, had there been anything in the evidence or in the

circumstances of the killing showing justification or excuse, the court should have qualified the instruction. The instruction is not approved, but we think under the evidence no prejudice resulted. It is our duty under the statute to decide the case without regard to technical errors which do not affect the substantial rights of the parties. It is not error to fail to instruct that a presumption may be rebutted, where there is no evidence in the case tending to rebut the presumption. *State v. Wilson*, 152 Iowa, 529. The court fully and carefully explained all the degrees of homicide as applied to the different charges in the indictment. Under the indictment and the evidence, the instruction here complained of, taken as a whole, and in connection with other instructions given, is not erroneous. It should be borne in mind on this point that the conviction was for only second degree murder.

V. Complaint is made of instruction No. 21. It is, in part, as follows: "You have been told herein that the defendant may be convicted of murder in the first degree,

5. SAME:  
cautionary  
instructions.      or murder in the second degree, or manslaughter, or he may be found not guilty.

This does not mean that you are at liberty to convict or acquit at pleasure. . . . The fact that you have power to return a verdict finding a lesser crime or acquittal is alone no excuse for using such power. The lower conviction or an acquittal should not rest on the notion that you can do as you please arbitrarily." The instruction then proceeds to tell the jury that, if they have a reasonable doubt of the degree, to acquit of the higher, or, if they have a reasonable doubt of his guilt, to acquit. Instruction No. 16 also correctly directed the jury as to their duty if they had a reasonable doubt as to the degree of guilt, if guilty, and that they should acquit if they had a reasonable doubt as to his guilt, and in instruction No. 41 they were told to retire and consider the case fairly and honestly in the light of the evidence and the instructions.

Counsel insist that the jurors "are at liberty to acquit at pleasure; that is, exactly what they have a legal right to do." To such a doctrine we can not assent. Jurors can act arbitrarily, and they have the power to do as they please, but they have no right, either legal or moral, to do so. It is true they do have the right to say which of the witnesses they will believe, and which they will not believe, and have a right to disbelieve all of them.

We are cited to *State v. Lightfoot*, 107 Iowa, 352, and *State v. Carter*, 112 Iowa, 15. These cases simply hold that the court can not assume a fact to be true in a criminal case, even though uncontradicted; that it is for the jury to weigh the evidence, and not for the court. In the first of these cases the court was discussing the question of trial by jury under the Constitution. In the argument in that case it was said, and of course it is true, that the jury could disregard the evidence and their own consciences, but that is not saying they ought to do so, or that it would be right. It is proper to caution the jury to not act arbitrarily, but to decide the case on the evidence, under the instructions, disregarding all else. *State v. Butts*, 107 Iowa, 653; *State v. Engstrom*, 145 Iowa, 205; *State v. Hunter*, 118 Iowa, 695. So far as we know, counsel for the defense may have argued to the jury as they have here that the jurors had the right, as well as the power, to acquit the defendant, even though they may have been satisfied beyond a reasonable doubt of his guilt. If so, the court had authority to caution the jurors as to such argument, and it was its duty to do so. Matters occur in the trial which do not appear in the record in this court. Whether or not a cautionary instruction is required rests largely in the judgment and discretion of the trial court. *Hoskovec v. Street Ry.*, 85 Neb. 295 (123 N. W. 305). Whether the jurors could be called to account if they did act arbitrarily we need not now determine. But in *State v. Miller*, 53 Iowa, 84, 154, 209, this court approved an

instruction in which the jurors were told that it was their duty to follow the law as given by the court, and that, unless they did so, they were guilty of perjury. There was no error in this instruction.

VI. Soon after the coroner arrived at the scene of the killing, he placed the son, William White, under arrest. Within a few minutes, or at least within a short time after this, William had a conversation with one Lee in the house. He was then under arrest, and says he thought they were accusing him of shooting his father. His appearance at this time as witnesses describe it was that of having been badly pounded up, his eyes and lips were swollen and bloody, and it is claimed this was done by the defendants before the killing. He says he was frightened and made statements which were not true. On cross-examination by defendant's counsel he was asked about these statements, and as to whether he did not tell Lee he was in bed, undressed, and as to whether he was asked by Lee who shot his father, and other similar questions. On reexamination he testified that, after telling Lee these things, he told Lee and Dr. Townsend to come outdoors, and he would tell them the whole story. They went out immediately, and at this point the record shows the following:

Witness William White, on reexamination testified that:

After telling Mr. Lee this language, I said something else to him, and asked Mr. Lee and Dr. Townsend to come outdoors, and I would tell them the whole story. Q. What is the fact as to whether you told them anything then as to just what happened that night? (Objected to as calling for the conclusion of the witness, immaterial, irrelevant, and not proper redirect examination. Overruled.) A. I did. Q. What is the fact as to whether you told them then the same way you have told the jury as to the death of your father? (Same objection, and for the reason he has told the story two or three different ways, and the jury

6. EVIDENCE:  
sufficiency  
of objection.

can not tell which one he means; calling for a conclusion and opinion, and not a statement of the conversation.) Court: He may narrate the conversation. Counsel for State: Well, I will prove it by the other people.

Dr. Townsend was then called, and testified:

I heard the story told by William White immediately after he made certain statements to Mr. Lee. It was told to Mr. Lee, myself, and Mr. Shannon. Mr. Lee says to him, 'How is this, your shoes on and all laced up, and your coat on, your collar on, and your father and brother shot here, and you say you were in bed?' White says, 'You come out here and I will tell you the exact truth.' So we went outdoors, and he told us about being with Wilson and Mertens. Q. Did he tell you who shot his father then? A. He did. (Objected to as immaterial, not proper cross-examination.) Well, what is the objection? Defendant: Immaterial, hearsay, incompetent, and irrelevant. Court: I think it is as to what he told him. Counsel for State: We claim that is a part of the *res gestae*. It occurred right there, and it is a part of the conversation about which they have inquired; the witness admits that he told a story that was untrue, and right then and there, as soon as he got his second breath, he turned around to these men and says, 'If you will come out, I will tell you the exact truth of what happened.' Court: It may be part of the *res gestae*. Counsel for State: That is what I am claiming for it, and that it is a part of the same transaction. Court: Go ahead. A. He said Clifford Wilson shot his father. I have heard his testimony given here in regard to the shooting. Q. What do you say as to whether or not he told you the same story, in substance, then and there, when he told you to come out there, that he now tells upon the stand? (Objection sustained.) Q. In this conversation with Mr. Lee and you and the other man, did William White ever say that anybody else than Clifford Wilson shot his father? (Same objection. Overruled.) A. No, sir. He never said who shot Matthew White, and never made any claim that he knew who shot Matthew.

It is now objected by defendant that this was hearsay.

But, under the foregoing record, that objection seems not to have been made in the district court to the statement that White said "Clifford Wilson shot his father." That is the part of this testimony now most seriously objected to, because, as counsel argue, it bolsters up White's evidence wherein he had testified that he saw Clifford Wilson shoot deceased. It will be noticed that the first time the objection was made that it was hearsay was after the answer to the question, "Did he tell you who shot his father?" and there was no motion to exclude the answer. That objection was either to the preceding question, or to the answer to it, so that the only question properly objected to as hearsay was the last one above quoted.

True, some of this evidence, if not all, was objected to as incompetent, etc., but, as we have said, the argument here is based on the thought that it is hearsay. The general objection that it is incompetent, irrelevant, and immaterial is not sufficiently specific to raise the objection now that the evidence was hearsay. *White v. Smith*, 54 Iowa, 233; *Buettner v. Steinbrecher*, 91 Iowa, 588; *State v. Beebe*, 115 Iowa, 128; *Matthews v. Luers*, 110 Iowa, 231; *Longan v. Weltmer*, 180 Mo. 322 (79 S. W. 655, 64 L. R. A. 969, at page 976, 103 Am. St. Rep. 573), 8 Am. & Eng. Enc. Pl. & Pr. 223-227.

But, conceding for the purpose of argument that the evidence was properly objected to, especially as to the last question, it is clear to us it was a part of the same conversation about which defendant's counsel had cross-examined the witness. And, further, it was immediately after the conversation in the house and a part of the *res gestae* of that transaction in regard to the conversation, and explanatory of the evidence brought out on cross-examination in regard to that matter. Without further discussion, the following cases indicate the tendency of recent decisions on the doctrine of *res gestae*: *Ins. Co. v. Mosley*, 75 U. S. (8 Wall.) 397 (19 L. Ed. 437);

7. SAME:  
res gestae.



*Puls v. Grand Lodge*, 13 N. D. 559 (102 N. W. 165); *State v. Blydenburg*, 135 Iowa, 264. In the cases cited by appellant the matters claimed as *res gestae* related to a past transaction after it was over.

VII. In the state's rebuttal, one Goodson testified as follows:

After supper at Coney Island, on May 29th, Clifford Wilson and Mertens went to one side and talked by themselves, and afterwards they called me over. Wilson said that he knew a girl at Nemaha. Q. Did Clifford say to you that he knew a girl in Nemaha, and that she was a sporty woman? (Objected to as immaterial whether he did or not; if offered for the purpose of impeachment, it is impeachment of immaterial matters, it has no connection with this tragedy. Overruled.) A. Yes, sir; he said she was a sporty woman. He said that he and Mertens were going to telephone to her and were going to go up and get her and bring her down to Sac City, and, if I and a man called the barber would chip in and help pay the expense, that he would give me a bottle of whisky.

It is said that in admitting that part of the evidence objected to the court erred, for that it tended to discredit a girl who was a witness for defendant, and who lived at Nemaha. The only objection as to this was

3. SAME:  
impeachment: evidence.

that it was immaterial. The name of the girl was not mentioned in the evidence of Goodson. But defendant's counsel say it referred to the young woman to whom defendant claimed he was to be married. Defendant also claims that such evidence related to collateral and immaterial matters brought out on cross-examination, and not properly the subject of rebuttal. Defendant testified on cross-examination, without objection, in regard to this matter, and denied having made the statement. He admits that he may have said something about a sporting woman that afternoon. Defendant accounts for his presence at the home of James White, deceased, by a story which the state claimed was highly



improbable. Without going into all the details, his claim, stated as briefly as may be, is: That he was engaged to be married to this young woman, who was a farmer's daughter, nineteen years old, and lived three miles from Nemaha. That prior to May 29th it had been understood that they would be married June 15th. Mertens was a stranger to defendant and to William White. They met during the day of May 29th at what is called Coney Island, or the Jungles, a place on the river near Sac City where tramps and drinking parties meet. That day some one had stolen a quantity of liquor, hid it, and defendant says he went and got it, and hid it in the weeds. He says he had two bottles with him and hid twenty-one. It was whisky, as we understand it. Defendant says he drank with Mertens and got "chummy" with him, and told him of his girl at Nemaha. That he told Mertens he was going to see her, and that Mertens said he was going along. In the evening he telephoned her to meet him at the train at 10 o'clock that night. Mertens may have paid for the telephone message. That he and Mertens did take the train about 9 o'clock that evening and went to Nemaha, but the girl was not at the depot, so they came back to Sac City on a freight train. He says he did not ask Mertens to go; that he (defendant) had lots of whisky, and Mertens went for a little trip. About 11 o'clock that night defendant and Mertens were with William White at a restaurant, and soon after that the matter of defendant's marriage was discussed, and White suggested they get an auto, and go and see the girl that night. Defendant had no money to get a car, so White gave him his pocketbook, and told him to get a car. Defendant started to the city hall to telephone for a car, but met the night watch, and, while waiting for him to get out of sight, they spoke of a time they had had at Sioux City. Defendant spoke of his approaching marriage on June 15th, and White suggested that they go at once, hire a car, get the girl and go from Nemaha

to Storm Lake, catch the train, go to Sioux City and have a time. Defendant was willing to do this, and White was to furnish the money. As they walked along, White wanted to put it off until some other night, but defendant insisted that, as they had gone that far, he wanted to go on. The argument got pretty hot, he says, and White wanted his money back and grabbed defendant, when defendant hit him and knocked him down. Finally they made up, and decided to go on the trip. At this point Mertens appeared, according to defendant's evidence, and White started to run and Mertens went after him. Defendant did not go home then because White wanted him to go with him to get the \$100, and defendant was willing to go. The three, William White, defendant Wilson, and Mertens, then went to the home of deceased, where William White was staying. The shooting took place very soon after. White denies all this evidence as to the part defendant claims he was to take in the marriage, and as to his furnishing the money. White's claim is that defendant and Mertens robbed him of his pocketbook, and asked whether White's father and brother had any money at home, then forced him to go with them to the home of deceased; that on the way Mertens gave him two beatings; and that this defendant pointed the pistol (with which the shooting was afterwards done) at him and threatened to kill him, if he told any one.

Without commenting on this story of defendant, we think the evidence of Goodson was competent and proper rebuttal as bearing on the probability or improbability of defendant's story, not to discredit the girl. In fact, her character was not attacked either in the evidence or the argument to the jury. It was a proper circumstance for the jury to consider whether defendant's story was true, if he himself considered her a sporty woman. A witness may be cross-examined concerning his inconsistent conduct, and his inconsistent action and conduct may be shown as

well as statements. Jones on Evidence (Pocket Ed.) sec. 845.

Furthermore, the testimony in dispute was that of the party himself. He had told in detail his doings and sayings that afternoon and evening, including transactions

and conversations with this same witness  
9. SAME.

Goodson, who had been on the stand as a witness for defendant. It is doubtless true that ordinarily a witness may not be contradicted on collateral and immaterial matters brought out on cross-examination. We think the evidence was properly admitted, and, even if it was collateral, it was a matter of discretion for the trial court. Jones on Evidence. (Pocket Ed.), sec. 172.

VIII. It is claimed that the verdict is not supported by sufficient evidence. That it is the result of passion and prejudice, and that the judgment is excessive. The evi-

dence for the defense as to the shooting was  
10. CRIMINAL  
LAW: murder:  
evidence:  
sufficiency. almost entirely that of the defendant. Im-  
peaching evidence was introduced, tending to  
show that his moral character was bad, and no evidence  
was offered to sustain it. It would serve no useful purpose  
to set out the evidence fully, and the opinion ought not to  
be extended to do so. Some of the evidence has already  
been referred to. William White was an important witness  
for the state. He had been drinking and had been roughly  
handled, and it is conceded made some false statements,  
but his evidence is corroborated circumstantially at some  
of the important points. We think the jury were fully  
justified in believing that the old gentleman was shot while  
he was in the sitting room. William White so testified,  
and that deceased fell at the first shot. The deceased was  
found there soon after with two mortal wounds, one of  
which, according to the evidence, would produce instant  
death. There was a large pool of blood under his body,  
but there was no trace of blood from the kitchen to the

sitting room, and none on his face or hands. There was no evidence of any struggle.

The evidence for the state tends to show the following facts in addition to those already stated: When defendant, with Mertens and William White, reached the walk leading from the street to the house of deceased, defendant told White he could go in. White did go in the house at the west kitchen door, then went north into the sitting room, and to his father's room through an opening at the northeast corner of the sitting room. The father's bedroom, and another bedroom south of it, in which Matthew slept, were east of the sitting room. There is an opening in the south side of Matthew's room into the kitchen, and a porch west of the kitchen. There were lights burning low in the kitchen and sitting room. When William went in, he woke his father, and told him there were two men going to rob him. The old gentleman jumped quickly out of bed, and went into the sitting room. William was then standing in the doorway or opening from his father's room into the sitting room, with his head about a foot out in the sitting room. He says he then ~~saw defendant~~ Wilson and Mertens just inside the sitting room near the door between the kitchen and sitting room, and that they had handkerchiefs over the lower part of their faces. The old gentleman ordered them out, and almost instantly he was shot twice; the shots being close together. That defendant Wilson pointed the pistol at deceased when he fired, and that deceased fell to the floor at the first shot; that the second shot was fired when deceased was down. Shortly after three other shots were fired in quick succession, then it was quiet. William and his mother found James White on the floor in the sitting room, and Matthew lying dead with three bullet wounds. His body was lying near the west kitchen door. It is the claim of the state that at the first shooting Matthew came into the kitchen from his room through the door near the northeast corner of the kitchen.

A person who had been sleeping in a tent near these premises testified that after the shooting he heard two people pass, walking, and one said to the other: "I got 'em, I know I got 'em, come on." Defendant admits this conversation, except that he says the language was, "I got 'em both," but he claims Mertens said it to him. Defendant testifies he thought Mertens meant he had shot someone. He ran home and told his mother about it. She says he came home about 12 o'clock, that he had been running and was out of breath, and that he had been drinking. Defendant admits he had been drinking, but testifies he was at himself, and knew what he was doing. The mother further testifies that defendant said, "One of the guys that was with me tonight shot a man." Defendant had passed the night watch a few minutes before, and must have known where the officer was, but did not inform the officers of the shooting. Defendant was arrested the next day, and a witness testifies that his father told him to tell these men all about this, to which defendant replied, "Yes; I will tell them a damned sight." The use of this language is denied by defendant and his father, though they admit a conversation on that subject. Defendant testifies that, when they got to the house of deceased, he did not go in, but he heard Mertens and William White go in; that he heard William say that Wilson and this fellow were trying to rob him, and it made him mad. He says further: "As I started in somebody hollered, 'Get out of here, you blackguards,' and I turned and ran. At that time I was on the porch, right in front of the door that goes in from the porch. I was not inside the room. I could not have been more than a step, I just started in. I was not in the kitchen, but was just starting into the door when I started to run. There was no light in the kitchen when I started to go in. When I put my foot in the door, I heard some one say, 'Get out of here, you blackguards,' and I started to run, and did not stop until I saw mother. We had been

planning until we got to the house, and I thought Bill was going in to get the money." He admits that the brown hat introduced in evidence was his, and says: "I had it on that night and lost it when I turned and ran from the porch, but don't know where. I did not lose it inside the house." A witness testifies to finding this hat the next morning on the floor in the kitchen. From the evidence we judge it was found about where the dead body of Matthew was found. Other witnesses who were there testified that they did not see the hat in the kitchen. If there were but five shots fired, they are all accounted for.

It is argued by the defense that the bullet found in the wall over the door in the north side of the kitchen and near the northeast corner is the bullet which went through the body of James White; that, therefore, James White was in the kitchen when he was shot, and that William White from his position could not have seen the shooting. The bullet in the wall was over the door from which Matthew must have come from his room into the kitchen. The argument is that, considering the place where this bullet was found in the wall, and its distance from the floor, the height of the deceased, and the position a person firing the shot would be likely to be in, and the angle a bullet would take under such circumstances, that this bullet must have gone through the old gentleman. This was a circumstance proper for the jury to consider. The evidence was such, however, that it was a question for the jury. We have already said that the jury may have well believed that deceased was in the sitting room when shot. If there were six shots, as some of the evidence tends to show, one of them could have been aimed at Matthew as he came out of the door of his room and gone wild. The evidence tends to show that a person standing where William says he did could look southwest, through the door between the kitchen and sitting room, and see across a part of the northwest corner of the kitchen as far as the west kitchen door. It

would be difficult for any person under the circumstances to locate the exact position of every person concerned in the shooting. We have given more of the evidence than we intended, but have not set out the details of all of it. Enough has been given to show that it was clearly a question for the jury. The jury found defendant guilty; the evidence was such that a verdict of either first or second degree murder would be sustained. It was an aggravated killing, and the judgment is not excessive. The verdict being for murder of the second degree, the jury evidently were not carried away by anything occurring on the trial.

IX. W. A. Helsell assisted in the trial as special prosecutor. Appellant contends that said Helsell was guilty of such misconduct in his closing argument to the jury as

to require a reversal. A great many matters are complained of. It is another case coming to us where the closing argument only was taken down by the reporter, and counter affidavits were filed by the state as to what counsel for the defense said in their arguments to the jury. The closing argument is set out in full in sixty-six pages of the typewritten abstract of record. Ninety-six of the one hundred and fifty-seven pages of appellant's printed arguments are taken up in the discussion of this proposition, and seventy-nine cases are cited. Manifestly we can not review all these at length in an opinion which is already beyond reasonable limits. It is doubtful whether many of the matters in the closing argument of which complaint is now made were properly excepted to and in time.

Some of them, including the reference to the hat, were excepted to in the motion for new trial which was too late. *State v. Sale*, 119 Iowa, 1.

It should be said, however, that there were at first some interruptions of Mr. Helsell by counsel for defendant, and defendant did object to some of the statements, when

Mr. Helsell asked counsel to not interrupt him, and said that they could have an exception to all the argument.

12. SAME.

The state, in resistance to the motion for new trial, filed the affidavits of Mr. Helsell and six others, which were not denied by the defense. In these affidavits it is claimed that all the matters complained of were in answer to arguments of attorneys for defendant. The argument itself purports to be so, and we are reasonably satisfied that this is true. We have no means of knowing certainly. This being so, we ought not to interfere. *State v. Hutchinson*, 95 Iowa, 566; *State v. Sale*, 119 Iowa, 1.

The situation as we view it, and the record bears us out, is simply this: The defense was represented by shrewd, able counsel of high standing and large experience. The county attorney alone may have been at a disadvantage against such an array of opposing counsel. It is a well-known fact that our prosecutors are as a rule young and inexperienced, but men of character, and who have the confidence of the people who elect them. It sometimes happens that they are not able to cope with the more experienced counsel usually retained in the more important cases, and the result is that occasionally a case is not as fully presented to the jury as it might have been, and there is a miscarriage of justice. We do not intend any reflection or criticism upon our prosecuting attorneys, the jury system, or our juries. Jurors are usually inexperienced in such work, and in certain classes of cases they may be more or less prejudiced, yet as a rule they do right. While there may be an occasional miscarriage of justice, this is the exception and not the rule, and there are at the same time hundreds of cases, civil and criminal, where justice is done. These are looked upon as being a matter of course, and are not mentioned, while the exceptions are freely and widely commented upon, and then well-meaning people, who do not understand the situation, condemn our juries,



the courts, and the laws as a whole. In this case Mr. Helsell was appointed or employed as a special prosecutor. This has been repeatedly held to be perfectly proper, and the statute provides for it, and yet it was argued to the jury that he had no business in the case; that he was in the case for pay, trying to coin drops of blood into gold; that he was trying to convict a man he knew to be innocent; that he was guilty of manufacturing evidence. And, if he made an objection to the evidence, it was argued he was trying to suppress evidence, and so on. The oral argument in this court was along the same line. The special prosecutor was really placed on trial. It all sounds very familiar. Of course, the prosecutor, special or general, ought to be fair and ought to stay within the record, and the defense ought to do the same. The better way would be to try all cases on the merits. If counsel on either side do not keep within the record, they should be disciplined by the court, if necessary; but, if attorneys for one side expect the other to stay within the record, they should do so themselves. *State v. Cleary*, 97 Iowa, 413. The rules are well settled in this state as to what matters counsel may talk about in argument to the jury. There are many cases, among them *State v. Burns*, 119 Iowa, 663; *State v. Drake*, 128 Iowa, 539. If counsel are exceeding the proper limits of argument, it is the duty of the trial court to stop them on his own motion, or sustain an objection thereto, if objection is made at the proper time. From the fact that the court did not do so in this case justifies us in assuming that he considered the argument of Mr. Helsell as within proper bounds. The trial court heard all the arguments, and was in a much better position than we can be to determine the matter.

We shall notice some of the objections now made to the remarks of the special prosecutor in regard to the defendant's hat, which was introduced in evidence and which is before us. This is the matter about which the

defense most complains. There was a dispute in the evidence as to whether the hat was in the kitchen. A witness for the state testified to finding it on the floor in the kitchen the morning of and after the tragedy. Other witnesses who were there did not see it. Mr. Helsell argued that it was about the same color as the floor, and that for that reason the witnesses may have overlooked it. He then threw the hat on the floor of the courtroom for comparison. No witness testified to the color of the floor of the kitchen. We think the color of our ordinary wood floors is a matter of such common knowledge that proof is not required; but a photograph of the kitchen was in evidence, which shows the floor to have been covered with figured oilcloth or linoleum. The jury had the photograph and the hat before them and in their jury room, and could compare and determine for themselves whether the inference or conclusion of the prosecutor was correct. If counsel had thrown a black hat on a white snow bank, and argued that they were of the same color, the jury would have been apt to detect the difference.

Again, it is urged that the prosecutor was guilty of misconduct in claiming for the first time in the closing argument that there were blood spots on the hat. There are, in fact, one or two small spots on the hat which may be blood. There was no evidence introduced that they were. The hat was in evidence, without objection, and for all purposes. There may be cases where stains claimed to be blood should be shown by evidence to be such, but we can conceive of many others where proof would not be required. In this case the defense had argued strenuously that the hat was not in the kitchen, and challenged the state to tell the jury in the closing argument how it could possibly be so. According to the testimony of the witness who claims to have found the hat on the kitchen floor, it was found at about the place where the

13. SAME.

14. SAME.

dead body of Matthew White, with three bullet holes in it, laid. It may have been under the body. Under such circumstances, the conclusion of the prosecutor that the stains on the hat were blood was not unwarranted. It was not an unreasonable inference that the stains were blood, and that they were on the hat because it was in the house. The jury had the hat for inspection, and had the right to examine it and the spots. The prosecutor has a right, within reasonable limits, to draw his own deductions as to facts from other admitted or proven facts. *State v. Tippet*, 94 Iowa, 646; *State v. Thomas*, 135 Iowa, 717. It was said in the *Tippet* case: "We would not relax the rule requiring counsel to confine their arguments to the record; but, as we have said, inferences of facts, from facts and circumstances actually shown, are permissible, and unless such right is abused, or it is shown that the prosecutor has acted in bad faith, or has intentionally violated the rules applicable to arguments to the jury, and that such facts have prejudiced the defendant, we should not interfere."

In *State v. Thomas, supra*, it was said that mere misconduct of counsel is not enough alone to require the granting of a new trial, unless it appears to have been so prejudicial as to deprive the complaining party of a fair hearing of his case by the jury on the evidence. The trial judge saw and heard all that took place on the trial. It was his judgment that there was no prejudice. We ought not to interfere with his discretion in refusing a new trial. *State v. Waterbury*, 133 Iowa, 135; *State v. Norman*, 135 Iowa, 483. We have examined the entire record with care, and conclude that there is no sufficient justification in the record for interfering with the judgment.

X. Appellee filed an additional abstract, which appellant has moved to strike. The additional abstract properly corrects some matters, and a part of the testimony of the

defendant is set by question and answer. Ordinarily this is not to be commended, but under the circumstances of this case, we think it was justified, and the motion is therefore overruled.

16. APPEAL:  
abstract of  
evidence.

—*Affirmed.*

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ETTA DREIER, Adm. of the Estate of Louis Dreier, deceased, Appellant, v. THOS. W. McDERMOTT, W. E. CHAPMAN & SON, a copartnership, W. E. CHAPMAN and C. J. CHAPMAN, Appellees.

**Negligence: EVIDENCE: BURDEN OF PROOF.** The burden of proof is  
1 upon the plaintiff not only to establish a charge of negligence made against the defendant, but also to show by a preponderance of the evidence that the plaintiff himself was free from negligence contributing to his injury.

**Negligence defined.** Primarily negligence is predicated upon a fail-  
2 ure to discharge some private or public duty, and consists in the doing of some act, or the omission to do some act, which a reasonably prudent man would not do, or would not omit to do, under like circumstances.

**Negligence: DETERMINATION OF ISSUE.** Ordinarily negligence and  
3 contributory negligence are questions of fact for the jury, and sometimes even where the facts upon which the negligence is predicated are not in dispute it is for the jury to say whether the course of conduct charged and proven is in itself negligence; but usually where reasonably honest minds could reach but one conclusion from the proven facts, the question of either negligence or contributory negligence is for determination by the court.

**Same.** Where the negligence of both parties contributes to the injury  
4 complained of the courts will not listen to either.

**Contributory negligence: VOLUNTARY EXPOSURE TO DANGER: EVIDENCE.**  
5 Where a person knowingly places himself in a dangerous position which he might easily have avoided he assumes all risk incident thereto. In the instant case plaintiff was riding a nervous and difficult horse to handle when excited and frightened, of which he was fully aware, and he knew that she was afraid of automobiles and likely to become unmanageable on the approach of a machine; *Held*, that plaintiff was guilty of contributory negligence

as a matter of law in waiting for the approaching automobile to come directly opposite him without dismounting or signaling the driver of the machine to stop, and was thereby precluded from recovering for injuries caused by the frightened animal.

*Appeal from Pottawattamie District Court.*—HON. A. B. THORNELL, Judge.

WEDNESDAY, MAY 7, 1913.

ACTION to recover damages, resulting from injuries received by being thrown from a horse, which it is claimed became frightened at an automobile on the public highway. —*Affirmed.*

*John J. Hess and H. L. Robertson, for appellant.*

*John P. Organ and W. H. Killpack, for appellees.*

GAYNOR, J.—The plaintiff is the administratrix of the estate of one Louis Dreier, and as such brings this action to recover damages of the defendants, and predicates her right to recover on what she claims to be the negligence of the defendants.

The facts alleged in her petition upon which she predicates her right to recover are substantially these: That on or about the 12th day of September, 1910, the defendants Chapman & Son were in the business of running automobiles for hire. That the other defendant McDermott was in the employment of these defendants, and was charged with the duty of running or driving defendants' automobiles from place to place. That on said day the defendant McDermott was in charge of, and operating, an automobile for the other defendants, and while so doing negligently and carelessly drove one of defendant's cars with great force and violence into and against a horse on which Louis Dreier was then riding on the public highway,

knocking the horse down, breaking its leg, thereby throwing the said Louis Dreier from said horse to the ground, causing injuries from which he subsequently died. That said McDermott was at the time of the collision driving said automobile at a high and dangerous rate of speed without due regard to the use of said highway by others, and, while proceeding upon the highway at the point of the collision, turned the automobile to the left or wrong side of the road, and on the side on which Dreier then was, and further was guilty of negligence in that he did not use ordinary care to prevent the collision, and the injuries consequent thereupon. That he failed to exercise ordinary care, in that he did not stop when he saw, or should have seen, the horse on which Dreier was riding had become restive. The plaintiff further says that the said Louis Dreier was free from any negligence on his part contributing to his injury. The defendant for answer to the plaintiff's claim denies each and every allegation thereof.

Upon the issues thus tendered the cause was tried to a jury. At the conclusion of all the testimony, the defendants moved the court for an instruction to the jury to return a verdict for the defendants on the grounds: (1) That there was no evidence before the jury showing, or tending to show, any act of negligence on the part of the defendant such as charged by the plaintiff in her petition. (2) That the evidence before the court did not show that the said Louis Dreier was free from negligence on his part contributing to the injuries of which the plaintiff complains.

The court, upon the submission of the motion, overruled the motion on the first ground, and sustained it on the second ground, saying: "There is some question upon the whole record in my judgment as to whether negligence is shown on the part of the defendant McDermott, but upon that question I would let the case go to the jury, but on the other question raised by the motion, to wit, the negligence of the said Louis Dreier, I think the motion

of the defendant ought to be sustained." Upon that question the jury were directed to return a verdict for the defendant, and did return a verdict for the defendant, and upon the verdict so returned a judgment was entered against the plaintiff, and from this ruling and judgment the plaintiff appeals.

It must be borne in mind that in all cases of this kind, under the repeated holdings of this court, the burden of proof rests upon the plaintiff, not only to establish the negligence charged against the defendant, but also to show, by a preponderance of the evidence, that the party claimed to have been injured by such negligence was free from any negligence on his part contributing to the injury of which complaint is made, or to the conditions out of which the injuries arose.

Negligence is predicated primarily upon a failure to discharge a duty, whether that duty be owing to the public generally or to the individual and is defined to be the doing of some act which a reasonably prudent and cautious man would not do under like circumstances, or the omission to do some act which a reasonably prudent and cautious man would not omit to do under like circumstances, and which under the law or by reason of peculiar relationships existing it was his duty to do, or his duty not to do.

It is true that the negligence of the defendant and the freedom from contributory negligence on the part of the person complaining is usually a question for the jury, and it has been held that, even where the facts upon which negligence is predicated are not in dispute, it is sometimes a question for the jury to say whether or not the course of conduct charged and proven is in itself negligence; for them to say, from the facts proven, whether or not, under the circumstances of the case, a reasonably prudent and cautious man

1. NEGLIGENCE:  
evidence:  
burden of  
proof.

2. NEGLIGENCE  
DEFINED.

3. NEGLIGENCE:  
determination  
of issue.

would have done or would have omitted to do the things charged to have been done. But this is not a hard and fast rule, for it has been held that when reasonably honest minds, having before them all the facts, could, upon a question of negligence or freedom from contributory negligence, reach but one conclusion, it then becomes a question for the court, and then it becomes the duty of the court to instruct the jury definitely and distinctly as to what their duty is under the record so made.

Negligence charged against the defendant as a primary and moving cause of the injury is no different in its essential elements than is the negligence of the plaintiff which contributes to the injury complained

4. SAME.

of. No party can complain of the negligence of another where his own negligence is a concurring cause in producing injuries. Where the negligence of both parties contribute to the result, the courts will not hear the complaints of either. It is said that this rule is based upon two considerations: (1) That no one shall be permitted to take advantage of his own wrong. (2) Upon the supposed inability of a court of law to apportion the damages occurring to the respective faults of the parties.

So far as this case is concerned, upon the record here presented, we have but one question to consider, and that is: Did the evidence before the court at the time of the

5. CONTRIBUTORY NEGLIGENCE: voluntary exposure to danger: evidence.

ruling on the motion present such a state of facts, which, being conceded (and they must be conceded for the purpose of this case), that they showed such conduct on the part of the deceased, contributing to the condition out of which the injuries grew, that honest minds, dwelling upon the facts so presented could reach but one conclusion—a conclusion adverse to the plaintiff's claim that the deceased was free from any negligence contributing to his injury, or the conditions out of which, and as a consequence of which, the injury complained of arose and followed. To sustain



the ruling of the court, this question must be answered in the affirmative. Otherwise, it was a question for the jury.

The trial court was of the opinion that the evidence was insufficient to show that the deceased was free from negligence on his part contributing to the injury of which the plaintiff complained, and the court so held in full recognition of the rule hereinbefore stated. It becomes our duty, therefore, to examine the evidence upon which the court's ruling was predicated, and to ascertain therefrom whether or not it presented such a state of facts that honest minds could not differ as to the conclusion that should be reached.

It appears from the evidence in this case that the road on which the deceased and the defendant McDermott were traveling runs east and west; that the defendant McDermott was driving an automobile, proceeding westward on the road, and the deceased proceeding eastward on the same road; that at the point where they met there are banks on either side; that the roadway was about twenty-four feet wide; that the deceased was riding a very fine, high-bred mare, being three-quarters running stock, very quick of action, and difficult to handle and control when excited or frightened; that he had known this mare intimately for several years, had ridden her frequently and knew her peculiar characteristics, and the manner in which she conducted herself when frightened, knew that she was afraid of automobiles and traction engines; that he purchased her from one Dr. Wyland, who had owned her for about seven years; that he worked for Dr. Wyland, and had an opportunity of seeing and knowing this horse and her eccentricities and vagaries; that he purchased her from Dr. Wyland, and that at the time he purchased her he was told that she was afraid of automobiles and traction engines, and that he should look out for her at such times, or she would get him. It appears that this mare from her earliest years was inclined to be unmanageable. Even when a colt, she

was difficult to handle, and exceedingly difficult to control, and that her owner had much trouble in breaking her to do any sort of work.

One Carlson, testifying, said:

When she was a young mare, she would do anything except what I wanted. She would kick and buck and strike. She would rear up, and fall over other horses. We tried to work her on the plow and cultivator. She would rear and plunge in the air, and quite often get scared or mad. The first time we hooked her up, she kicked for several hours. She would kick and jump and strike the ground. She was very rapid in her movements. She would try to run. She was afraid of most everything on the road. The most scary and nervous horse I ever worked, and I have broken a great many horses. I traded her to Dr. Wyland, from whom the deceased purchased her.

Dr. Wyland testified:

I never drove her single. Whenever we met an automobile on the road, she would give evidence of being frightened. She was very hard to handle. Far more than the ordinary horse. I could manage her, but I had to hold tight rein on her. She would always run if she got a loose rein. She was quick as lightning, and had racing blood in her. Louis Dreier had charge of her when he worked for me. He often went out with me. When we met automobiles, she would always act as if she were frightened, scared. Whenever I saw an automobile coming I always began to get ready for business. I knew there would be something doing unless she was tired out. If she was real tired, she wouldn't pay much attention; but if she was not tired, or was in an active condition, you could feel that she was going to do something. I had to be very careful when I approached an automobile to know that I had her in check. When I sold her to Dreier, I told him that she was afraid of automobiles and traction engines, and that 'if he didn't look out, she would get him.'

Witness Gorman testified:

I saw this mare once when Dreier was riding her. I

was using a road grader. The horse got scared before she reached the grader, whirled and tried to get away, and threw herself back. When the mare fell, Dreier fell with her. When she got up, or was in the act of getting up, he mounted the saddle, and she ran right into my horses. She went like a shot out of a gun. She was violent. I would call her a kind of an outlaw. She was very quick. I saw her one time coming down by the pump. An engine we used for pumping. He was riding her at the time. She went down into the ditch with him. She did not throw herself. If she had gone down in the ditch like she did in the road, she would have killed him. He didn't get off of her. The actions of the mare were quick, and the boy was quick. He was an awful good rider. The deceased and Klopping were the best riders that ever came to Neola.

Witness Ryan testified:

She was very scary and very quick and very fast. She was so quick and so fast that I have seen her go out from under the deceased two different times. I mean by going from under him that the horse would start and jump so quickly, and would go on and leave him on the ground behind her, and other times I have seen her move so quickly that he would go off clear back to the back part of the horse, and he would grab her neck to keep from going under her. I have seen that several times. I have seen her go along and jump over embankments on the side of the road. Louis Dreier was riding her at the time. She was a horse that you wouldn't know what to expect from. The time she jumped over the bank was when she met an automobile in the road. It was quite a ways off at the time.

He further testified:

I would call Louis Dreier a good rider, but a careless rider. I rode with Dr. Wyland once when he owned the horse. I have seen the horse run away. I have ridden the horse myself. I rode her once. I then had experience enough with her.

Witness Klopping testified:

A day or two before the accident the deceased drove this mare with another horse by my automobile which was standing still. The mare got frightened when he attempted to pass the car. She plunged and went by on the gallop. He drove into my yard. When I came in, she shied again, but he held her. I told him not to drive too close. He replied that she wasn't half as scared as she let on to be, and said I should have seen her the other day. He says: 'I was going up a hill and met a car coming down. The mare waited in the road until the car got pretty close to me, and then she wheeled around and ran down the hill with me.' I asked him if he could not hold her, and he said, 'No.'

It appears that at the time of the accident the deceased, seeing the automobile approaching from afar, reined his horse on the south side of the road, facing the approaching car; that he gave no signal to the driver of the automobile that indicated, in the least, that he had any fear of his ability to manage and control this mare in the event she took fright; that no notice or warning was given by him to the driver that any danger attended him on account of its approach. He sat and waited for the automobile, and the horse gave no indication, so far as this record shows, of any disposition on its part to become frightened until the automobile had practically reached a point almost directly opposite the standing horse; that it then wheeled suddenly and started back; that a struggle then ensued between the boy and the mare for the mastery; that the boy succeeded in controlling her movements to such an extent that she wheeled again towards the automobile; that the automobile then was on the north side of the road, moving slowly; that, when the horse was turned, she reared on her hind feet and struck out with her forefeet; that there were in the back seat of the automobile at the time three young ladies; that the defendant McDermott, observing the wild and reckless character of the mare, as

indicated by her conduct, fearing that she would injure his passengers, wheeled suddenly to the left and drove the automobile into the south bank; that in the mix-up the boy was thrown from the mare and killed, his neck being broken; that the mare kicked and broke the wind shield in front of the automobile; that after McDermott had wheeled his car to the left and into the south bank, presumably in order to avoid the collision, the horse was still rearing and plunging a few feet from the automobile. Then instantly the horse came back to the rear of the car, and Dreier was still then on the horse, and it was rearing and plunging. The horse threw her head and struck Dreier in the face. He fell to the ground and dislocated his neck.

It is not apparent from the record clearly just when it was that the horse kicked the wind shield and broke the glass and the side lamp, but it does appear that these things happened in the mix-up, and that immediately thereafter the horse ran away, and was subsequently discovered with one of its hind legs broken and many scars and bruises on its body. The whole matter happened so quickly that it is difficult to say from the record just at what point, time, or place any of the conditions shown to exist after the injury actually occurred or were brought about.

There is much confusion among the witnesses, as to what happened at the point of injury. There is no doubt that the occupants of the automobile were at the time greatly frightened. A rearing, plunging, maddened horse, in close proximity to the occupants of such a vehicle, has not a tendency to quiet the nerves, or to give calm, cool, and dispassionate judgment as to the details of what is being done. But we have no concern with the testimony touching the conduct of the defendant, since that matter was disposed of by the trial court. Our concern is only with the conduct of the deceased, and to ascertain and determine from conceded facts whether or not he was guilty

of negligence contributing to the conditions existing there which resulted in his death.

Some testimony has been introduced tending to modify, but none to contradict, the force of the testimony hereinbefore set out. Evidence is only for the purpose of carrying to the mind of the trier the knowledge of the existence, or nonexistence of disputed facts, and we are of the opinion that no one can read this whole record, and not feel convinced beyond a doubt, that the mare upon which plaintiff was riding at the time of his injury was wild, vicious, and unmanageable when frightened, and that she was easily frightened when approached by an automobile; that the deceased knew this fact when he saw the automobile approaching; that when he reined his horse by the side of the road, and saw the automobile approaching he smelt the smoke of battle from afar off; that he knew that a struggle must take place between him and his mare for the mastery. He waited for the struggle and the struggle came, and the consequences complained of followed; that from the knowledge he had of this mare, of her disposition, and what he might reasonably have anticipated concerning her conduct, common prudence would have suggested at least that he give warning to the driver of the car as he approached, and this, if not for his own safety, for the safety of the occupants. Common prudence would have suggested that he turn from the point of danger, or that he dismount until the automobile had passed. None of these things he did, or attempted to do. He was a good rider, nervy and full of courage. He thought that he could control the mare. He knew that in many of these contests he had been vanquished, but still his courage rose above the danger. The approach of danger has an exhilarating effect upon many, and they meet it in hopeful expectation of victory. They like the struggle and defeat only serves as an additional incentive to the struggle. This seemed to be characteristic of the deceased. Men have a right to assume positions of

danger. They have a right to struggle for the mastery. They have a right, so far as they themselves are concerned, to imprudently put themselves in positions of danger, but, when they do this, the consequences of their rashness must fall upon their own heads.

It has been repeatedly held that where one knowingly places himself in a place of danger which he might easily have avoided he assumes all the risks incident thereto. It has been held where one knowing that the horse he was riding or driving became frightened at the approach of trains, and he remained in the seat until the train approached and scared the horse, he was guilty of contributory negligence, on the ground that he did not exercise that care for his own safety under the circumstances which a reasonably prudent and cautious man would have exercised. In support of this, see *Cornell v. Detroit Electric Ry. Co.*, 82 Mich. 495 (46 N. W. 791). See, also, *Flagg v. C. D. & C. G. T. Ry. Co.*, 96 Mich. 30 (55 N. W. 444, 21 L. R. A. 835). In the last mentioned case it was said: "The plaintiff saw the danger, knew the colt was young, not accustomed to the place, and that there was a safe way out, and, instead of adopting such a course, she took a chance of holding the colt and let the train pass. This was a miscalculation on chances, and she must suffer the consequence." As bearing upon this proposition, see *Gorman v. Des Moines Brick Co.*, 99 Iowa, 257; *Sutton v. Des Moines Bakery Co.*, 135 Iowa, 390; *Erdman v. Deer River Co.*, 182 Fed. 42 (104 C. C. A. 482); *Kroger v. Cumberland Fruit Package Co.*, 145 Wis. 433 (130 N. W. 513, 35 L. R. A. (N.S.) 473); *Oates v. Met. St. Ry. Co.*, 168 Mo. 535 (68 S. W. 906, 58 L. R. A. 447).

On the whole record, we think the case ought to be affirmed, and it is—*Affirmed*.

ELMA JOHNSON, Appellant, v. CHICAGO, ROCK ISLAND &  
PACIFIC RAILWAY COMPANY, Appellee.

**Railroads:** UNAUTHORIZED ACT OF EMPLOYEE: LIABILITY. The act of a railway employee, with whom the custody of torpedoes to be used in the giving of signals and operation of trains was entrusted, in attaching a personal note to a friend to one of the torpedoes and throwing it from the train as a means of delivering the message, was not within the scope of his employment; and the company was not liable to the party receiving the communication for an injury received from the subsequent explosion of the torpedo.

*Appeal from Johnson District Court.*—HON. R. P.  
HOWELL, Judge.

THURSDAY, MAY 15, 1913.

ACTION for personal injuries by reason of the alleged negligence of a brakeman. There was a demurrer to the petition which was sustained, and the plaintiff appeals.—*Affirmed.*

*Ranck & Messer, and T. P. Bence, for appellant.*

*Carroll Wright (deceased), J. L. Parrish, and Walker & Ferson, for appellee.*

EVANS, J.—The petition is lacking in directness of allegation and much is left therein to mere inference. Considering it, however, in the light of the arguments, the case presented is in brief as follows: The plaintiff lived near by the defendant's right of way. She was the friend of one of the defendant's brakemen. While upon a passing



train, he undertook to deliver to her a personal note from himself. He attached it to a torpedo for the purpose of weight and threw the same to the ground near the edge of the right of way near the plaintiff's home. It is alleged also that prior to such time he had "waved at this plaintiff and had by his acts and conduct indicated a friendliness toward her and had thrown off to her magazines and other articles." In pursuance of the intent of the brakeman the plaintiff obtained possession of the note and the torpedo, both being brought to her by a third person, her sister. Later she was injured by the explosion of the torpedo, being unaware of its dangerous character. It is averred also that said brakeman had the care, custody, and control of certain dangerous articles and weapons, namely, torpedoes; the care, custody, and control of the same having been intrusted to him by the said defendant company, said torpedoes being instruments placed by them in the hands and care of said employee, and being used in the operation and control of its trains and in giving signals and orders with reference thereto, and particularly with reference to that train upon which said brakeman was working and acting and upon which the said torpedoes were at the time of the happening of the things herein complained of.

The demurrer to the petition was interposed on the general ground that the act of the brakeman which is complained of was not within the scope or in the line of his employment by the defendant; that the act complained of was purely a personal transaction between the brakeman and the plaintiff and sustained no relation to the duties of the brakeman as an employee of the defendant.

Appellant concedes the general proposition that the defendant can not be held liable unless the act complained of was within the real or apparent scope of the brakeman's employment in a legal sense. But she contends that the use of the torpedo in the manner stated was within the

scope of his duty because he had been intrusted with the care and custody thereof by the defendant, and that the defendant was therefore bound to see that such torpedoes were so used and cared for as not to expose the public to danger. The petition clearly states a case of negligence against the brakeman. Whether such negligence, however, can be imputed to the defendant depends upon the question first stated. There is a little confusion in the argument at this point a tendency to assume that, if the brakeman owed a duty to protect the plaintiff against the danger of the torpedo, then the defendant would be liable as for the acts of its employee.

We will direct our attention to the one controlling question in the case: Was the act complained of within or without the scope of the brakeman's employment? It is clear on the face of it that the act of the brakeman in attaching a torpedo to a personal note and throwing it to the ground on the right of way near the home of the plaintiff was not an act within the contemplation of his employment. It was not an act which he was required to do for any purpose or under any circumstances in the line of his employment. The act was apparently purely personal between the brakeman and the plaintiff. The plaintiff herself responded to the act of the brakeman as being personal to herself. The question whether the act of a servant in a given case is within the scope of his employment is often a very difficult one, although the books abound in cases on the subject. We find no case which has gone to the extent of holding that such an act as this can be deemed as within the scope of the employment of the servant.

It is contended by appellant that the case of *Alsever v. M. & St. L.*, 115 Iowa, 338, is warranty for her present contention. We think otherwise. The general question involved in this case received much consideration in the cited case, and we can do no better than to adopt the

discussion there contained. That was a case where an engineer of a locomotive playfully operated the blow-off cock of his engine for the purpose of frightening some little girls, one of which fell as the result of her fright and broke her limb. It was held that the act of the engineer was within the scope of his employment. It was a part of his daily duty to operate the blow-off cock at various times, according to the call of his judgment, for the purpose of the cleansing of his engine and perhaps for other appropriate purposes. It was said: "It was part of the engineer's duty to use this blow-off cock. For all the record discloses, he may then have been operating it to cleanse the boiler. There is no evidence to the contrary. Whether, incidentally to cleansing it, he engaged in the diversion of frightening the children, or blew off the steam or spray for that express purpose, however, we think, can make no difference. The company had placed in his charge an instrumentality requiring care in its operation and management. He was doing precisely what the company contemplated he should do when it employed him, i. e., operating the blow-off cock. When this was to be done and how, as said, was left to his discretion, the use of which was also contemplated in his employment, and the company was as responsible for a mistake or willful perversion of judgment in its operation, if within the compass of what he was to do, when amounting to negligence, as for his negligence in doing that which may be conceded to have been necessary." *Rounds v. Railway Co.*, 64 N. Y. 129 (21 Am. Rep. 597); Cooley, Torts, page 534. This distinction is well illustrated by the case of *Cobb v. Columbia & G. R. Co.*, 37 S. C. 194 (15 S. E. 878), where the company was declared liable for the misconduct of the engineer in willfully or wantonly blowing off steam so as to scare a horse and cause it to run away, but not liable for the misconduct of the trainmen, contributing thereto, by shouting. The engineer was doing that which he might, but for the proximity of the horse,

lawfully do within the scope of his employment. Trainmen were under no circumstances engaged to do what they did. The one thing was done within the master's business; the other without. And on this principle *Kincade v. C. M. & St. Paul*, 107 Iowa, 682, and *Marion v. Railway Co.*, 59 Iowa, 430, are to be distinguished from the case at bar. The abstract rule or test was stated as follows: "We think the true test that stated by Judge Cooley in his work on Torts (page 536): 'The test of the master's liability is not the motive of the servant, but whether that which he did was something which his employer contemplated, and something which, if he could do it lawfully, he might do in the employer's name.'"

Applying, therefore, the discussion in the *Alsever* case to the case at bar, we think it quite adverse to appellant's contention. It can not fairly be said that the act done by the brakeman was "something which his employer contemplated," nor "something which, if he could do it lawfully, he might do in the employer's name."

The appellant places reliance upon two authorities announced by the Supreme Court of Ohio, viz., *Harriman v. P., C. & St. L. R. Co.*, 45 Ohio St. 11 (12 N. E. 451, 4 Am. St. Rep. 507); *P., C. & St. L. R. Co. v. Shields*, 47 Ohio 387 (24 N. E. 658, 8 L. R. A. 464, 21 Am. St. Rep. 840). There is some discussion in these cases which is favorable to appellant's contention. The same court, however, in a later case, reviewed these cases, setting forth more fully the facts upon which they were based and materially circumscribing their apparent holding. *Cleveland v. Marsh*, 63 Ohio St. 236 (58 N. E. 821, 52 L. R. A. 142). We quote therefrom as follows:

The error occurred by regarding the principles of the case of *Harriman v. Pittsburg, C. & St. L. R. Co.*, 45 Ohio St. 11, 12 N. E. 451 (4 Am. St. Rep. 507), as applicable to the facts of this case. In that case an exploded signal torpedo was knowingly and recklessly left on

the railroad track at a point where the public, including children, had for years been permitted to cross the track, using it as a path of travel, and the torpedo was picked up by a boy at that place while using the path of travel in the usual manner, as one of the public passing and repassing along the same; while in the case at bar the torpedo was not picked up by the boy while passing along and upon the railroad track as one of the public, but while going upon the track in the performance of his engagement with the station agent, to light the lamp at the switch stand. His being upon the track at that time was not induced by the fact that the track had been used for years as a line of travel by the public, but by reason of his engagement to light the lamps. His rights and the liabilities of the railroad company would have been the same if the track of a railroad company had never been used as a line of travel, or if the injury had occurred while the boy was going to the switch stand south of the highway, where the railroad was not used as a line of travel, so far as appears in this case. The principle is the same as that held in *Kelley v. Columbus*, 41 Ohio St. 263, 270, where the court says: "If there had been a business room in the building, or upon another part of the lot, which would have been an implied invitation to the public to go there, it still would not help the plaintiff, when he admits that he did not go upon the lot for any such purpose." Counsel for defendant in error have cited and strongly urged the cases of *Defiance Water Co. v. Olinger*, 54 Ohio St. 532 (44 N. E. 238, 32 L. R. A. 736), and *Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.*, 60 Ohio St. 560 (54 N. E. 528, 45 L. R. A. 658, 71 Am. St. Rep. 740), but those cases are not applicable to the case at bar. The principle of those cases and *Fletcher v. Rylands*, L. R. 1 Exch. 265, upon which they are founded, is that, if the owner of a dangerous animal or substance allows it to escape or sends it from his own premises upon the premises of another, he is liable for all proximate damages resulting therefrom. In the *Defiance Water Co.* case, water was allowed to escape to the premises of another, and it was held that proper damages might be recovered. The following cases throw some light upon the rights of the parties where some substance is cast upon the premises of another: *Columbus & H. Coal*

& *I. Co. v. Tucker*, 48 Ohio St. 41 (26 N. E. 630, 12 L. R. A. 577, 29 Am. St. Rep. 528); *Collins v. Chartiers Valley Gas Co.*, 131 Pa. 143 (18 Atl. 1012, 6 L. R. A. 280, 17 Am. St. Rep. 791); *Letts v. Kessler*, 54 Ohio St. 73 (42 N. E. 765, 40 L. R. A. 177); *Kelley v. Ohio Oil Co.*, 57 Ohio St. 317 (49 N. E. 399, 39 L. R. A. 765, 63 Am. St. Rep. 721). *In the case at bar nothing was sent or allowed to escape from the premises of the railroad company, but the injury occurred upon its own premises. The boy came to the dangerous object, instead of its escaping and going to him. The principles governing the two conditions are very different.*

It will be seen that this last utterance of the Ohio court bears against the appellant's contention here. Quite in point on the same question is *Obertoni v. Boston & Maine R. R.*, 186 Mass. 481 (71 N. E. 980, 67 L. R. A. 422). Also *Sullivan v. Louisville R. R. Co.*, 115 Ky. 447 (74 S. W. 171, 103 Am. St. Rep. 330); *Smith v. N. Y. Central*, 78 Hun, 524 (29 N. Y. Supp. 540).

The case of *Cobb v. Columbia*, 37 S. C. 194 (15 S. E. 878), furnishes a strong and perhaps technical illustration of the distinction between acts without and acts within the scope of employment. In that case the defendant company was held responsible for the misconduct of its engineer in wantonly blowing off steam so as to frighten a horse and causing it to run away. It was also held that it was not responsible for the misconduct of the trainman in shouting so as to frighten the horse. Appellant brings to our attention statements of several text writers tending to support her contention. But these texts are all based upon the two Ohio cases to which we have already referred and of course add nothing thereto.

The tendency of the courts has at all times been to solve doubts against the employer in this class of cases to the extent, at least, of submitting the question as one of fact to the jury. But the rule of law as such is not to be ignored. Like the other departments of government, the

courts are progressing along some lines. But it will be some time before the courts can hold that a mere act of courtship can be deemed referable to the commands of an employer.

We think the trial court ruled properly and its order is—*Affirmed*.

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CLEMENCE FALCON, Appellee, v. F. P. BOYER, Appellant.

**Drainage: NATURAL WATER COURSE.** A water course is a natural  
1 stream of water usually flowing in a definite channel and discharging itself into some other stream or body of water. Its origin need not be exclusively the work of nature, but may be aided by the hand of man; and if, after becoming a flowing stream, it has remained in that condition for the prescriptive period, it becomes a water course as to the lands through which it flows and the rights of the owners thereof, and the right to divert or control it to the prejudice of riparian owners becomes fixed and settled. In the instant case previous owners made slight excavations to facilitate the flow over their lands in the natural course, and the water gradually cut a deep, wide channel along that course in which it flowed for many years, and thus it became a natural water course.

**Same: RIPARIAN RIGHTS: DIVERSION OF WATER COURSE: DAMAGES: IN-**  
2 **JUNCTION.** The owner of land through which there is a natural water course may divert the course of the stream on his own land, provided he returns the water back to its natural channel before it reaches the land of the lower riparian owner. Both the lower and upper owners are entitled to have this done, and where the water has been diverted from its natural channel and thrown upon the land of another he not only has a right of action for damages, but he may restrain the party from thus diverting the water to his prejudice.

**Injunction: MANDATORY ORDER.** Primarily the office of an injunction  
3 is to restrain rather than to compel the performance of an affirmative act; but if required to effectuate the principal purpose of the order the defendant may be required to do some affirmative act.

**Same: WATER COURSES: INADEQUATE LEGAL REMEDY.** Where the injury  
4 resulting from a nuisance is of a permanent character, and the damage flowing therefrom is original and can be compensated in one suit, the injured party has a plain, speedy and adequate rem-

edy at law; but where the injury is not of a permanent character and is subject to change without the intervention of human agency equity will intervene by way of injunction to protect the rights of the injured party. Thus equity will restrain the diversion of water from a natural stream by means of a ditch which is subject to change from time to time by the action of the water, so that the injury is continuing; especially where future injury is to be reasonably apprehended.

Same: DAMAGES. Where one is permanently enjoined from diverting  
5 the water of a stream from its natural course by means of a ditch, on the theory that it is a continuing injury to plaintiff, he should not at the same time be charged with damages on the theory that the injury was permanent, and thus be compelled to pay apprehended injury from a continuance of the ditch.

*Appeal from Linn District Court.*—HON. M. P. SMITH,  
Judge.

WEDNESDAY, JULY 2, 1913.

ACTION in equity to restrain the defendant from diverting the waters of a running stream from its natural course on his land to the land of the plaintiff and for damages. Judgment and decree for the plaintiff.—*Modified and Affirmed.*

*Jamison, Smyth & Hann*, for appellant.

*Voris & Haas*, for appellee.

GAYNOR, J.—The defendant, Boyer, is the owner of the S. E.  $\frac{1}{4}$  of section 27. The plaintiff, Falcon, is the owner of the S. W.  $\frac{1}{4}$  of 26 and the N. E.  $\frac{1}{4}$  of section 34, and each was the owner of said land at the time of the happening of the matters complained of. That what is called by the plaintiff a branch of Indian creek, runs across plaintiff's land in section 26 and crosses the line between 26 and 27 about 27 rods north of the southeast corner of 27, passes through 27 in a southwesterly direc-



tion into section 34, and crosses the line between 27 and 34, 27 rods from the southeast corner of 27. That this so-called branch of Indian creek had its source some distance north and east of the point where it originally crossed the line between 26 and 27. That, from the point where it crossed the section line between 27 and 26, it continued in a southwesterly direction until it entered the main channel of Indian creek.

It appears that in November, 1905, the defendant built a dam across this branch of Indian creek just west of the line fence between sections 26 and 27, then dug a ditch upon his own land from that point south along the fence to the southeast corner of section 27; that, after building this dam and excavating the ditch, the waters of this stream were then forced to flow down the ditch so dug and, upon reaching the corner common to 26, 27, 34, and 35, were turned westward along the line between 34 and 27, and thence on until they emptied into the main Indian creek, at a point about 27 rods west of the corner common to the four sections aforesaid.

This action was brought in equity to restrain the defendant from so diverting the waters of said stream by means of said ditch and casting the same upon plaintiff's land in section 34, and for a mandatory order compelling the defendant to remove the dam from said stream so that the waters might flow in their natural channel, and to require the defendant to construct a dam in said ditch to prevent the waters from flowing therein, and to recover damages of the defendant on account of the matters complained of.

The defendant claims that by building the dam aforesaid, obstructing the flow of water in its natural channel in this branch of Indian creek, and by the digging of the ditch aforesaid, the defendant caused the waters to be diverted from their natural course and cast upon plaintiff's land in section 34, to his damage.

Plaintiff says that, by the digging of said ditch and the maintenance of said dam between 27 and 26, the surface water from about 1,200 acres of land was gathered into the ditch and cast upon plaintiff's land in section 34, together with the waters of the creek, no part of which would, in any manner, have been thrown upon plaintiff's land had it not been for the dam so constructed and maintained. All of which defendant denies.

The court, at the conclusion of all the testimony, found the issues for the plaintiff and entered a decree that the plaintiff had sustained and was entitled to damages against the defendant. The court further found that in diverting the water course and gathering together the waters from a large area of land, to wit, about twelve hundred acres, and conducting them in the artificial ditch cut by defendant, the defendant has destroyed, in part, the boundary line and the plaintiff's fences thereon between said sections 26 and 27, cut a large, deep, and irregular ditch on the plaintiff's land twenty or more feet in width at the east end, and from ten to fifteen feet in width at the west end, on the north line of 34, and to a depth of four feet or more, and has washed away the plaintiff's east and west fence from the southeast corner of section 27 westward and cut and washed his division line between sections 34 and 27, and washed away his land; but the court expressly finds that the said sum of \$600 does not include any damages claimed, if any are claimed, by the plaintiff for the destruction of lateral support to his lands, and the plaintiff stated in open court that he makes no claim for damages on account of the destruction of the lateral support to his lands and waives all such claim. The court expressly finds and limits all damages awarded the plaintiff, to wit, in the sum of \$600, to the damages caused by and on account of the unlawful diversion of the water course by the defendant, and to the washing of the plaintiff's lands by reason thereof, and the destruction of

his boundary lines and fences erected thereon, etc., and awards no damages for the destruction of lateral support. The court further finds that the ditch has encroached upon plaintiff's lands, and is still encroaching upon the plaintiff's lands, southward from the dam to the southeast corner of said section 27 and conducting the water westward from the southeast corner of said section 27 about four hundred and forty-four feet, and that the same is done without any right or authority whatever, and the defendant is hereby enjoined from maintaining the said dam and the said artificial ditch, and from diverting or conducting any of the water collected at said dam in or through the said artificial ditch, and is hereby commanded and ordered by this court to at once remove the said dam and permit the waters collected at said point to flow in their natural way and manner across the section line, between said sections 26 and 27, and southwesterly across the southeast corner of the defendant's lands in section 27, in the natural water course, and in what has been termed the east branch of Indian creek.

From the judgment so entered the defendant appealed and complained: First, That the court erred in finding that the stream or channel across which the dam was built was a natural water course.

To this we can not agree. It appears that what is termed the East branch of Indian creek extended from a point northeast of the place at which it crossed the section line of 27 and 26, thence southwesterly through defendant's land, and entered into what is called Indian creek; that the water flows naturally in that direction; that many years ago, more than twenty, the then owners of the land made some excavations along the line where this stream was at the time the same was dammed; that, by the action of the water, the ground had been gradually cut away until, at that time, it had a well-defined channel, bed, and

1. DRAINAGE:  
natural water  
course.

banks, and that water was coursing through it during most of the year prior to the building of the dam; that this stream so constructed and maintained had been continued for more than twenty years, with the knowledge and consent of the parties to this suit and their grantors. That such a stream becomes and is, in contemplation of law, a natural water course as to these parties and their rights there can be no doubt.

There is no controversy here as to the facts touching this ditch, its construction and character. Therefore the question as to whether or not it is a water course is a question of law.

A water course is defined as a natural stream of water usually flowing in a definite channel, having a bed and sides, or banks, and discharging itself into some other stream or body of water. It is not necessary that its origin be exclusively the work of nature. It may be aided by the hand of man; but if thereafter it becomes a living flowing stream of water, with all the essential elements of a water course, and has remained in such condition for the prescriptive period, then, as to parties through whose lands it runs, and as to their rights, it becomes a water course, and their right to divert it or control it, to the prejudice of riparian owners, becomes fixed and settled.

It seems in this case a great many years ago the water that flowed in this stream subsequently followed this natural course; that the grantors of the plaintiff and defendant made some slight excavation in the ground tending to facilitate the flow of the water over their lands in this natural course. By the action of nature and the laws of gravitation, this water gradually cut a deep and wide channel through the ground, through which the waters had flowed for a great many years, discharging itself into what is known as Indian creek. The original source of the water is not shown in this record; but that they coursed through this channel for more than twenty years prior to

the time complained of, is shown by the evidence, and therefore, as to these parties, at that time, it was a natural water course.

The next question involves the right of the defendant to divert it from its course and to discharge it upon the lands of the plaintiff.

Our court has held (and this is but declaratory of the common law) that the owner of the land on both sides of the water course may divert the water, by artificial channel, upon his own land. He may change

2. SAME:  
riparian rights:  
diversion of  
water course:  
damages:  
injunction.

the course of surface water upon his own land by ditching or otherwise, providing, however, he return the water so diverted to

its natural channel above the land of the adjoining lower proprietor without material diminution in volume. In the case of natural water courses, to justify such a diversion, the water must be returned to the water course before it reaches the land of the lower proprietor. This may be exacted of him both by the upper and lower riparian owners. See *Hinkel v. Avery*, 88 Iowa, 47; *Davison v. Hutchinson*, 44 N. J. Eq. 474 (15 Atl. 257); *Troe v. Larson*, 84 Iowa, 649; *Dorr v. Simmerson*, 127 Iowa, 551; *Parizek v. Hinek*, 144 Iowa, 563; *Van Orsdol v. Railway Co.*, 56 Iowa, 470; *Johnston v. Hyre*, 83 Kan. 38 (109 Pac. 1075); *Weiss v. Oregon Co.*, 13 Or. 496 (11 Pac. 255).

Where a stream of water, such as this, is diverted from its natural channel and from the line which it pursued in the course of nature and is thrown upon the land of another, the party on whose land it is thus thrown may not only maintain an action for damages but may restrain the party from thus diverting the water to his prejudice. This has been so frequently held and is now so well established that it needs no argument. In support, however, of this proposition, see 30 Am. & Eng. Law (2d Ed.) 362, 363; *Albright v. Railway Co.*, 133 Iowa,

644; *Holmes v. Calhoun County*, 97 Iowa, 360; *Geneser v. Healy*, 124 Iowa, 310; *Everett v. Christopher*, 125 Iowa, 668; *Meir v. Kroft* (Iowa), 80 N. W. 521; *Brown v. Armstrong*, 127 Iowa, 175; *Jones v. Stover*, 131 Iowa, 119; *Kane v. Bowden*, 85 Iowa, 347; *Priest v. Maxwell*, 127 Iowa, 744; *East St. Louis Ry. Co. v. Eisentraut*, 134 Ill. 96 (24 N. E. 760); *Union Pac. Ry. Co. v. Dyche*, 31 Kan. 120 (1 Pac. 243); *Tillotson v. Smith*, 32 N. H. 94 (64 Am. Dec. 355); Angell on Water Courses (6th Ed.), section 96; *Mohr v. Gault*, 10 Wis. 513 (78 Am. Dec. 687); *Vogt v. Grinnell*, 123 Iowa, 332; *Pettit v. Grand Junction*, 119 Iowa, 352; *Wharton v. Stevens*, 84 Iowa, 107; *Waverly v. Page*, 105 Iowa, 225.

It is next contended that the decree of the court is wrong in that it contained a mandatory order on the defendant. Upon this point we have to say that, while the office of an injunction primarily is to restrain, and not to compel, the performance of an act, yet, if it be necessary in order to make the restraining order effectual, the party against whom it is issued may be required to perform some affirmative act which will make effectual the main and controlling purpose of the order. It can not be maintained that, because an injunction primarily is to restrain, and not to compel, the performance of an act, it can not be used, when the effect of yielding obedience thereto requires the performance of some affirmative act. That is, the court may grant an injunction, the essential nature of which is to restrain, although, in yielding obedience to the restraint, the party may be required to perform some affirmative act. Otherwise often the injunction would be ineffectual. In support of this see *Allen v. Stowell*, 145 Cal. 666 (79 Pac. 371, 68 L. R. A. 223, 104 Am. St. Rep. 80); *Troe v. Larson*, 84 Iowa, 649. In this last case it is said: "A mandatory order is not to correct a wrong of the past, in the sense of redress for the injury

3. INJUNCTION:  
mandatory  
order.

already sustained, but to prevent further injury. The injury consists in the overflow of the lands of the plaintiff. It was not alone the building of the dam that caused the injury, but its maintenance or continuance, which is a part of the act complained of; and its maintenance can only be estopped, so as to prevent the injury, by its removal. The removal of the dam, wrongfully constructed, is necessary for and incidentally involved in the preventive redress which the law authorizes."

It is next contended that the damage in this case, as disclosed by the pleading and the evidence, was original damage, and not continuing, and therefore that an injunction would not lie; that the plaintiff had a plain, speedy, and adequate remedy for all the damages which he sustained; that they had all accrued at the time of the commencement of this action and were capable of definite ascertaining.

Whenever the nuisance is of such a character that, in its then condition, it is necessarily an injury, and it is shown, that it will continue in such condition unchanged (that is, that it is of a permanent character and can only be changed by human labor, by the interference of man), then the damage is original and may at once be fully compensated in one suit, and the party injured has a plain, speedy, and adequate remedy at law for the wrong. The rule is based upon the thought that, the nuisance being permanent and unchangeable, except by the hand of man, the damage that flows from it is also of a permanent character and, whether past or prospective, can be estimated and full compensation made to the party for the wrong done. But in this suit the structure complained of is not of a permanent character, has and is changing without the intervention of any human agency. It changes from natural causes applied to the conditions created, and the damage, instead of being original, is continuing, and in such a case equity

4. SAME:  
water courses:  
inadequate  
legal remedy.

will intervene by way of injunction. The evidence discloses that the ditch, as originally constructed, has changed, through the operations of nature upon it, both the ditch, as constructed by the defendant, and the east and west ditch on the plaintiff's land. It further discloses that in the future damages that are not now ascertainable are reasonably to be apprehended from the structure, if permitted to remain. Therefore equity steps in for the protection of the party against the apprehended injury. In such cases equity, looking to the then existing conditions, restrains the continuance, when future injury from a continuance is made reasonably certain, and enjoins and restrains the continuance of that from which the threatened injury proceeds, and, having by this power afforded protection from the future, grants redress for the injury already done, and may, in a mandatory order, require the undoing of that from which the threatened injury proceeds.

It is next claimed that the evidence does not disclose any injury to the land in section 26, except such as might arise from the destruction of the lateral support of plaintiff's land along the line of the ditch; that any claim for damage on this ground was waived by the plaintiff; that the damage, if any, of which plaintiff complained can be found only in the injury done to his land in section 34, and this damage exists only in the trespass of the defendant in appropriating plaintiff's land along the north line of section 34 as a passageway to conduct the water from his ditch to the main channel of the Indian creek.

We have examined the record in this case with some care upon the question of damage, and we are persuaded that the court, in the disposition of the case, treated the

5. SAME: wrong as continuing, and the damage as  
damages. continuing, for the purpose of the injunc-  
tional order, and treated it as original for the purpose of  
estimating damages. In this we think there was error,  
and that the damages allowed should be only such as were



sustained by the plaintiff up to the time of the commencement of the action. It would be inequitable to restrain the defendant from the continuance of the ditch, require him to close the ditch from further use and to open the original stream for the conduct of the water to Indian creek, and at the same time charge him with damages for apprehended injury from a continuance of the present conditions. A careful reading of the record satisfies us that the court erred in the allowance of damages to this extent; that the damage allowed should not exceed the actual damages then sustained, which we ascertain and fix at \$200; and the court is directed to modify and correct the decree appealed from to this extent, and, as so modified, the judgment is affirmed and further orders that each party pay half the costs of this appeal.

*Modified and Affirmed.*



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**Payment: Mistake: Recovery: Evidence.** In this action to recover money claimed to have been paid by mistake and oversight, the evidence is held to require a finding that plaintiff's testator gave a check to defendants in settlement of a partnership account, which by mistake and oversight was not taken into account in the final settlement, and that plaintiff was entitled to recover the difference between what testator was owing the partnership and the amount of the check. *Nothem, Ex'rs v. Londergan*, 146.

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**Rents and profits: Personal services.** Where defendant took possession of his mother's farm under an express agreement that he was to have what he could make from it, and in return take care of her, pay taxes and insurance and make improvements and repairs, all of which he did, she was not entitled to an accounting for rents and profits during the existence of the arrangement; nor to compensation for her services while they thus lived together. *Parmenter v. Parmenter*, 195.

## ACTIONS.

**Abatement of actions: Another action pending.** As a general rule the pendency of an action in a foreign state can not be pleaded in bar of an action in this state; and this is especially true, where, as in this case, the foreign action was part of a scheme to defraud the stockholders of a corporation, and was the basis of their action against the directors. *Reed v. Hollingsworth*, 94.

**Removal of causes: Amount in controversy: How determined.**

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The amount involved in an action for damages, for the purpose of removal from the state to a federal court, is governed by the amount for which judgment is prayed, rather than by an allegation in the petition that plaintiff's damage was a larger sum. *Bacon v. Iowa Central Railway Co.*, 493.

**Jurisdiction of federal court: Dismissal of action: Effect.** Where the amount in controversy is less than \$2,000, as appears from the pleadings, the cause is not removable from the state to the federal court. And where the defendant filed with the clerk a petition and bond for removal, based on the amount in controversy, which appeared from the pleadings to be less than \$2,000, and without directing the attention of the court thereto caused the transcript to be filed in the federal court, and that court merely continued the case and finally dismissed it, without determining its jurisdiction or passing upon the merits, the dismissal was not a bar to further prosecution in the state court. *Idem.*

**Same.** The mere filing of a petition and bond for the removal of a cause to the federal court does not deprive the state court of jurisdiction, unless the record shows on its face that the petitioner can remove the cause as a matter right under the statute; and where this does not appear from the entire record, it is not only the right of the state court, but its duty, to proceed and determine the issues in the ordinary course of litigation. *Idem.*

**ACKNOWLEDGMENT OF INSTRUMENTS.**

**Qualification of Notary.** An attorney for the mortgagee in foreclosure proceedings has no such interest in the matter as will disqualify him from taking the acknowledgment of the sheriff's deed, and thus render the same invalid. *Mitchell v. Vest*, 336.

**ADVERSE POSSESSION.** See HIGHWAYS.

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**Principal and agent: Possession of property by agent: Authority to sell.** The mere possession of property by one not the owner is not sufficient to establish agency or authority to sell on his part; but the property may be left with him by the owner under circumstances indicating that it was for sale. Thus where it conclusively appeared that plaintiff's agent was authorized to dispose of buggies through a scheme of selling coupon books at a race meeting, and after the meeting the

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buggies were left in his possession, the question of his then actual or apparent authority to sell for cash was for the jury. *Anderson v. Patten*, 23.

**Same: Apparent authority.** An agent's apparent authority to sell an article belonging to his principal must be determined by the acts of the principal and not those of the agent; and a third person can only rely upon actual apparent authority, and he must deal in reliance thereon in good faith and in the exercise of reasonable prudence. *Idem.*

**Same: Authority of agent to sell: Evidence.** In this action to recover a buggy which plaintiff's agent had sold defendant at the close of a fair or race meeting, which had been exhibited and the agent had attempted to sell by means of a coupon scheme, it was competent for plaintiff to show a custom of exhibitors to sell such articles as they could during the meeting or after its close, as bearing on the agent's authority to sell. *Idem.*

**Same: Instruction.** It is not the law that one in good faith purchasing property from a person simply intrusted with the same acquires as good title as though he had dealt with the real owner; and the instruction to that effect in this case was erroneous. *Idem.*

**Same: Authority of agent: Evidence.** The declarations of an agent are not competent on the question of his authority; and the instruction in this case permitting the jury to consider such declarations along with the other evidence in the case was erroneous. *Idem.*

**APPEARANCE OF COUNSEL.** See APPEAL — MARRIAGE AND DIVORCE.

**APPEAL.** See DRAINAGE — EQUITY — INTOXICATING LIQUORS.

**Abstract of evidence.** Ordinarily the practice of setting out the whole testimony by question and answer in an abstract is improper. *State v. Wilson*, 698.

**Abstract: Presumption as to evidence.** It will be presumed on appeal that the appellant's abstract contains all the evidence necessary to a consideration of the errors presented, unless the appellee shall supply alleged omissions by an amended abstract. *Ek v. Phillips Fuel Co.*, 433.

**Conclusiveness of record.** It will be assumed on appeal that

## APPEAL Continued

papers and documents included in a transcript which have been duly certified by the judge and reporter are a part of the record, though not specially identified. *Mengel v. Mengel*, 630.

**Same.** The recital in the record on appeal that a party appeared in person on the hearing of an application for the order appealed from can not be contradicted by parol, but must stand until the record has been corrected in the district court; and where the order appealed from appears from the record to have been entered in the district court, and is properly in the proceedings of that court, it will be assumed that the application was heard by the court and not a judge thereof. *Idem.*

**Dismissal: Waiver.** Mere delay in the prosecution of an action, if ground for the dismissal of an appeal, is waived by failing to raise the question in the trial court. *Cherokee v. Illinois Central Ry. Co.*, 73.

**Same.** The presumption obtains that public officers perform their duties faithfully and with due diligence; and a mere showing of delay on the part of the trial court in ruling on a motion to dismiss the action will not justify its dismissal on appeal because of plaintiff's failure to prosecute. *Idem.*

**Same: Moot question.** Where no issue of fact or law has been joined in the trial court the appellate court can not say, on a motion to dismiss the appeal, that the controversy presents only a moot question. *Idem.*

**Abstract: Inadvertent error.** The inadvertent use of the term defendant instead of plaintiff, in abstracting the record regarding the perfection of an appeal by service of notice, which could in no manner have been misleading, will not deprive the appellate court of jurisdiction. *Idem.*

**Authority of counsel to appear: Presumption: Waiver: Procedure.** It will be presumed that a city solicitor in appearing for the city was authorized to do so, in the absence of a showing to the contrary; and where there was no ruling by the trial court on a demand that the solicitor show his authority the demand will be treated as waived, and the action will not be dismissed on appeal from a judgment of dismissal by the trial court, but will be permitted to stand for further proceedings. *Idem.*

**Reservation of exceptions: Motion for new trial.** Where defendant moved for a directed verdict at the close of plaintiff's evidence, and again at the close of all the evidence, and re-

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quested several instructions asking for a directed verdict because of insufficiency of the evidence, saving proper exceptions to the court's adverse rulings, the sufficiency of the evidence was reviewable on appeal although no motion for a new trial was made. *Underwood v. Oskaloosa Traction and Light Co.*, 352.

**Special findings: Conclusiveness.** The appellate court will not disturb the finding, in answer to a special interrogatory, which has support in the evidence. *Scott v. O'Leary*, 222.

**ARGUMENT.** See NEW TRIAL.

**ASSAULT.** See CRIMINAL LAW.

**ASSUMPTION OF RISK.** See NEGLIGENCE.

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**Pleadings: Amendment.** It was not an abuse of discretion for the court to permit the defendant, at the close of all the evidence, to amend his counterclaim for the wrongful suing out of an attachment, so that the same would be based on the attachment bond. *Welsh v. Haleen*, 647.

**Wrongful attachment: Malice: Burden of proof: Instruction.** Under a counterclaim for wrongful attachment, an instruction that if plaintiff had no reasonable cause to believe the ground alleged for the attachment to be true the jury might infer that it was maliciously sued out, was neither erroneous nor placed the burden on plaintiff to show want of malice; especially as the court further told the jury that the burden was upon defendant to show that plaintiff had no reasonable cause to believe that the ground stated for the attachment was true, which carried with it the burden of proving malice. *Idem*.

**Burden of proof.** Where there is direct proof of malice in suing out an attachment, it combines with the inference of malice to be drawn from the fact that the attaching creditor had no reasonable cause for believing that the ground of the attachment was true, in establishing the preponderance of evidence required of the party alleging that the attachment was wrongful. *Idem*.

**Exemplary damages: Excessive verdict.** The allowance of exemplary damages and the amount thereof rests with the jury; and the instruction that where malice is found the jury is not limited to actual damages, nor required to scrutinize the

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## CHATTEL MORTGAGES

amount of the verdict very closely, was not erroneous; as it could only be understood to apply to the amount of exemplary damages. There was warrant for the allowance of both actual and exemplary damages in this case, and the verdict is not so large as to warrant interference. *Idem.*

**Counterclaim: Amendment on retrial: Change of issue.** Where an attachment was dissolved on the ground that the fund garnished belonged to defendant as executrix and not individually, and on a counterclaim for damages the court on appeal held that defendant was not damaged, for the reason that the attachment did not prevent payment to her as executrix, an amendment to the counterclaim on retrial, alleging that plaintiff knew when the fund would be paid to the garnishee and that he would retain the same until the garnishment was disposed of; that while the fund technically belonged to defendant in her representative capacity plaintiff knew that she had an individual interest therein, and that she could not make distribution until the garnishee was discharged; and that the garnishment was made to injure and deprive her of her interest therein, did not change the issue tendered originally so as to avoid the effect of the prior decision, as it pleaded no facts as the basis of liability not appearing in the former record. *Peters v. Snavelly-Ashton*, 270.

**Dissolution of attachment: Attorney's fees.** Attorney's fees are not allowable for procuring the discharge of an attachment, where no property was wrongfully levied upon. *Idem.*

**ATTORNEY'S FEES.** See MARRIAGE AND DIVORCE.

**AUTOMOBILES.** See NEGLIGENCE.

**BOARD OF PUBLIC WORKS.** See MUNICIPAL CORPORATIONS.

**BOUNDARIES.** See REAL PROPERTY.

**BURGLARY.** See CRIMINAL LAW.

**CARRIERS.** See RAILROADS.

**CANCELLATION OF INSTRUMENTS.** See EQUITY.

**CHATTEL MORTGAGES.**

**Description: Sufficiency.** The description and location of property in a chattel mortgage must be sufficiently specific to enable a person not a party to the instrument to identify the



## CHATTEL MORTGAGES Continued

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same, in order that the record may constitute notice to a purchaser from the mortgagor. In the instant case the description being of "all" the property owned by the mortgagor of such description, and as being in the possession of the mortgagor at his "premises in Monona County, Ia.," is held sufficient. *Ashley, Adm'r v. Keenan, 1.*

**Same: Payment: Evidence.** In this action by the holder of a chattel mortgage to recover part of the mortgaged property from a purchaser from the mortgagor, the evidence is held sufficient to support a finding that the mortgage had not been paid. *Idem.*

**Recovery of property by mortgagee: Estoppel.** The fact that a chattel mortgagor retained possession of the property, managed, used and controlled it in the usual way, that sales were made from the same and applied on the mortgage debt and that numerous payments were made covering a series of years, did not estop the mortgagee from recovering certain of the property sold by the mortgagor to a third party. *Idem.*

**Same: Evidence.** In an action by a chattel mortgagee to recover possession of mortgaged property, a conversation of the mortgagor with a relative of the mortgagee, who had no interest in or control over the mortgage, in which the mortgagor stated that he intended to apply the proceeds of certain cattle he was about to sell upon the mortgage debt, was immaterial and properly excluded. *Idem.*

**CONTAGIOUS DISEASE.** See PUBLIC HEALTH.

**CONTRACTORS.** See MECHANICS' LIENS.

**CONTRACTS.** Affecting REAL PROPERTY, see REAL PROPERTY.

**Parol evidence: Admissibility.** In this action to recover money paid on a written contract under an alleged mutual mistake, the plaintiff, having offered oral evidence of communications between the parties leading up to a written modification of the original contract, could not object to like evidence by defendant in response to that offered by him. Besides, evidence of the acts and communications of the parties after the execution of the modification of the contract was admissible, in so far as it bore on the performance of the agreement, or tended to show the construction placed upon it by the parties. *Scott v. Wilson, 31.*

**Parol evidence: Variance.** A condition precedent to the ef-

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to

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fectiveness of a contract, which does not go to its terms but to the question of whether there was in fact a completed agreement, may be shown by parol. *Healy v. Hohn*, 375.

**Evidence in explanation of ambiguity.** Where a contract is not intelligible to an ordinary person without the aid of extrinsic evidence, a letter written by one of the parties at the time of making the contract, purporting to be an interpretation of its meaning in some essential particular, was admissible in explanation of the ambiguity. In the instant case the letter in connection with the interpretation of the contract by the mutual acts of the parties is held to show that plaintiff was entitled to pay for one hundred lecture engagements as the minimum guaranteed number. *Boyl v. Midland Lyceum Bureau*, 578.

**Breach: Damages.** Under a contract that a lecturer should receive no pay for an engagement which he failed to fill, the bureau was not entitled to damages because of such a failure, and for which he made no charge. *Idem*.

**Nonperformance: Rights of third parties.** Where a party agreed to pay a certain sum on the exchange of properties, and also a certain note on which the wife of the other party was a surety, and in addition gave another note indorsed in blank as collateral, the rights of the wife in paying the note on which she was surety and in obtaining the collateral were governed by the contract, and she could only recover to the extent of his nonperformance. *Bosley v. Lammers*, 438.

**Rescission: Fraud: Estoppel.** A party is not estopped from pleading fraud in the procurement of a contract until the fraud is discovered. Thus where a refusal to perform a contract for the exchange of lands was based on the ground that the contract was not completed, and defendant pleaded that all he knew of the land the adverse party was to convey was what he stated, and upon subsequent investigation found the statements false, he was not estopped from pleading the fraud, when sued for liquidated damages for refusal to perform, as ground for rescission. *Weseman v. Graham*, 430.

**CONVERSION.** See TRUSTS.

**CONVEYANCES.** See TAXATION — TRUSTS.

**Delivery: Presumption: Acceptance: Burden of proof.** A duly executed and recorded deed is presumed to have been de-

## CONVEYANCES Continued

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livered, and this presumption can not be overcome except by clear and satisfactory evidence. The mere fact that the grantee was of unsound mind at the time of recording will not of itself negative delivery. And where the instrument recites a paid consideration, and imposes no duty or obligation on the grantee, it is presumptively beneficial to him, and proof of acceptance is unnecessary. *Burch v. Nicholson*, 502.

**Declarations of former owner: Admissibility.** Where an adult son, to whom his mother had conveyed her farm, lived with her on the land and cultivated it, her declaration that she regarded the son, who had been confined in the hospital for the insane, as capable of accepting the deed and that she advised him of its execution, were admissible against her heirs when attacking the validity of the deed; but such declarations, so far as tending to negative the intent to be presumed from recording the deed, were incompetent; the son being insane at the time of the suit. *Idem*.

**Present title: Validity: Evidence.** The title to property conveyed can not be defeated by failure to pay a remaining portion of the consideration. Nor are the declarations of a deceased grantor admissible for the purpose of attaching a parol condition to a deed, thus destroying its validity. *Idem*.

**Same.** The presumption of delivery arising from the recording of a deed can not be overcome by evidence that the grantor was advised against its delivery until the price was paid; or by subsequent declarations to the grantee that he was not to have the deed until he had performed certain conditions. *Idem*.

**Insane grantor: Good faith purchaser: Notice.** Where a previous grantor had not been adjudged insane, an executed conveyance by him for value will not be set aside, as against a subsequent good faith purchaser without notice, where the subsequent purchaser can not be put in *statu quo*. *Idem*.

**Sale of minor's interest: Validity: Limitations.** Where the guardianship proceedings for the sale of a minor's interest in land were admitted to be regular and that proper notice was given, the minor can not question the regularity after the expiration of the statutory period limiting a right of action in such cases. *Idem*.

**CORPORATIONS.** See INSURANCE — RAILROADS — TELEGRAPHS AND TELEPHONES.

## CORPORATIONS Continued

**Action by stockholders: Condition precedent: Demand.** Stockholders of a corporation may prosecute an action on their own behalf and that of other stockholders similarly situated, against the officers, directors or other stockholders, who are seeking by fraud, misfeasance or unlawful acts to do injury to the corporation or its stockholders; but as a general rule they must first demand of the managing officers that they bring the action, unless such demand would be futile, as where these officers are themselves guilty of the fraud or misfeasance charged. *Reed v. Hollingsworth*, 94.

**Receivers: Parties.** Ordinarily the local receiver of a corporation is the proper party to bring an action on behalf of the stockholders and demand should be made on him to do so before the stockholders act, but if his appointment was fraudulent and a part of the scheme to defraud the stockholders no such demand is necessary; and if the property which is the subject of litigation has never come into the hands of the receiver, but has at all times remained with the corporation and its officers, the receiver is not a necessary party to the stockholders' action. *Idem*.

**Same: Foreign Receivers.** The receiver of a corporation appointed by a foreign court, never having been appointed in this state, can not sue or be sued here, and is not a necessary party, nor is a demand on him to bring suit necessary before the institution of an action by the stockholders; and even if a proper party the court having jurisdiction of the other defendants, could proceed and award any appropriate relief. For like reasons the stockholders are not compelled to go into the foreign courts for leave to sue the receiver, or to secure an order for him to bring the action. *Idem*.

**Same: Parties.** The corporation is not a necessary party plaintiff to a stockholders' action against the directors; and a failure to serve the corporation with notice when made a defendant is not ground for demurrer because of defect of parties. *Idem*.

**Same: Jurisdiction.** The fact that real property of a corporation located in another state is incidentally involved in a stockholders' action against the directors for fraud will not deprive the courts of this state of jurisdiction. *Idem*.

**Sale of stock: Statutes: False representations.** Under the present statutes relating to incorporation and requiring payment in cash for all stock issued, unless the executive council shall

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## CRIMINAL LAW

grant leave to accept property in payment therefor, and the filing of a verified statement of the amount issued, date, etc., the issuance of stock is a representation by the subscribing officers that the corporation had received its par value, and will support an action to recover money paid for stock in reliance upon the representation. *Sykes v. Pure Food Cider Co.*, 601.

**Fraudulent issuance of stock: Liability of officers.** From the authentication and issuance of corporate stock knowing that it contained false statements, it will be inferred that the officers acted with intent to defraud, not only purchasers dealing directly with them for the stock, but all who purchase the same in reliance upon the representations contained therein and who are damaged thereby. *Idem*.

**Undivided earnings: Interest of life tenant.** A stockholder has no right to the earnings of a corporation until a dividend has been actually declared, either in form or in substance; and the enhanced value of the stock by reason of withholding the earnings inures entirely to the benefit of the same, from which a life tenant can derive no advantage prior to an order for its distribution by the corporation. *Lauman v. Foster*, 275.

**Same: Income from corporate stock.** A cash dividend upon corporate stock, whether accepted in cash or additional stock taken in lieu thereof under an option granted the stockholders, is acquired as a dividend and goes to a life tenant. But where the corporation increases its capital stock, not as a dividend, and permits its stockholders to acquire the new stock in proportion to the amounts held by them, the new stock thus acquired is to be treated as capital, and any amount realized by a trustee holding stock as a part of his trust, either from a sale of the privilege or an exercise of the same himself and a subsequent sale at a profit, belongs to the body of the trust, and the life tenant is only entitled to the dividends arising therefrom. *Idem*.

**COTENANTS.** See TENANCY.

**CRIMINAL LAW.** See PHYSICIANS — NEW TRIAL

**Abortion: Necessity to save life: Evidence.** On the prosecution of a physician for abortion the burden is upon the state to negative the defendant's good faith exercise of his best skill and understanding, believing the operation necessary to save the patient's life. In the instant case the evidence is held

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insufficient to show that defendant did not in good faith and in the exercise of skill and understanding believe that the operation was necessary to save the life of the patient. *State v. Shoemaker*, 176.

**Burglary: Evidence: Sufficiency.** The evidence in this case is held to justify conviction for aiding and abetting the commission of the crime of burglary. *State v. O'Callaghan*, 545.

**Burglary: Circumstantial evidence.** Burglary is provable by circumstantial evidence; and while the mere entry of a building is not of itself proof of felonious breaking, it bears upon that question: Thus where the evidence showed that defendant was wrongfully in the building, that he was there for the purpose of committing larceny and did commit larceny, that the windows were closed and the doors locked, and that there was no opening through which he could have entered the building without a breaking, refusal to direct a verdict for defendant on the ground of failure to prove a breaking was proper. *State v. Sorenson*, 534.

**Same.** Where the state relied on circumstantial evidence to establish the breaking, it was permissible to show the condition of the doors and windows, both immediately before and after the alleged burglary, for the purpose of showing that defendant could not have entered through them. *Idem*.

**Same.** The testimony of a witness that he entered the burglarized building immediately after the arrest of defendant as he was escaping from the building, by pushing in one of the doors, rendered the testimony of another witness to a like experiment unobjectionable, because subsequently made. *Idem*.

**Same: Evidence: Self-serving statements.** Evidence that defendant stated prior to the commission of the crime that he was going to the burglarized building to see the manager was inadmissible as a self-serving declaration; in the absence of any circumstances rendering the same pertinent. *Idem*.

**What constitutes "breaking."** Where the door of a building was so nearly closed that the accused could not enter without pushing the door further open, the wrongful entry of the building by thus pushing the door is burglary within the meaning of the law. *Idem*.

**Flight: Knowledge of accusation: Instruction.** Flight of an accused is a circumstance indicative of guilt only where he

## CRIMINAL LAW Continued

had actual knowledge of a suspicion or accusation against him; simply reason to know of such suspicion or accusation is not sufficient. The error of the instruction in this instance, however, is technical and without prejudice; as the alleged flight was so closely connected with the commission of the alleged offense as to render it admissible in evidence, regardless of the above rule. *Idem.*

**Larceny: Former jeopardy.** The theft of several articles at one and the same time, and by the same act, is an indivisible crime, even though the articles stolen belong to different persons and the takings were separated by a brief interval of time; and punishment for the theft of one of the articles is a bar to a subsequent prosecution for the theft of part or all of the other articles. In this action conviction for simple larceny for theft of a watch from one of defendant's roommates was a bar to a subsequent prosecution for larceny from the dwelling, based on the theft of money from another roommate at the same time. *State v. Sampson, 257.*

**Same.** Although the former prosecution for simple larceny was before a justice of the peace, and the latter prosecution was upon the charge of larceny from a dwelling house, of which a justice would not have jurisdiction; still as the former offense was included in the latter charge, the conviction for simple larceny was a bar to the subsequent prosecution. *Idem.*

**Same: Jurisdiction.** Although the larceny may have been from a dwelling, the state may disregard this aggravating circumstance and charge the defendant with simple larceny; and having done so it is in no position to question the validity of a conviction of the offense as charged, which was clearly within the jurisdiction of the court. *Idem.*

**Manslaughter: Negligent use of dangerous weapons: Instructions.** The use of deadly and dangerous weapons in a careless and reckless manner is such gross negligence as makes the act criminal, and if the act results in the death of another the accused is guilty of manslaughter. Under the evidence in this case it is held that the court correctly defined and submitted the issue of manslaughter, growing out of the negligent use of a dangerous weapon. *State v. Warner, 111.*

**Murder: Expert evidence.** Under the record in this case it was not improper to permit a medical expert to state his belief, rather than his opinion, that deceased could not have walked from one room to another after he was shot the first time;

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... made matter of expert testimony, and the inquiry ... as a ...

**Same.** Where there was evidence that a family in establishing a ... that a large artery of the chest was open, the evidence of an experienced undertaker that the chest of the deceased had to be ... before examination could be established, and that each fact indicated a break in the main artery, was admissible as expert evidence. *Idem.*

**Murder: Punishment: Instructions.** In defining murder in the first degree the court should include a statement of the punishment, which is to be fixed by the jury; but this is not required in defining murder in the second degree, or manslaughter. Where, however, the court defined second degree murder in the language of the statute, which includes the punishment, but made no reference to the punishment for manslaughter, no prejudice resulted to defendant; as the jury must have understood from the instructions that manslaughter is a lower offense than murder in the second degree, and that conviction for the latter offense would result in greater punishment. *Idem.*

**Malice: Presumption: Instruction.** Where there was no claim that defendant was justified in killing deceased, but he relied upon the defense that the killing was done by another, an instruction that when it is shown that the killing was wilfully and purposely done in pursuance of a previous design malice is conclusively implied was not prejudicial, though erroneous in omitting to declare the right to rebut the presumption; there being no evidence which could have rebutted the presumption. *Idem.*

**Evidence: Sufficiency.** The evidence on this prosecution is reviewed and held to support the conviction of defendant for murder in the second degree. *Idem.*

**Rape: Included offenses: Submission of issues.** On a prosecution for rape committed upon a girl under the age of consent, the indictment making no charge of the use of force and violence, the issue of assault and battery was not included and failure to submit the same was not erroneous. *State v. Butler, 163.*

**Seduction: Evidence: Instruction.** Where an accused, by false promise, protestations of love, deception or other artifice,



## CRIMINAL LAW Continued

persuades a chaste woman to yield her virtue, when but for some or all of these she would not have done so, he is guilty of the crime of seduction; and an instruction to that effect was proper, even though there was evidence that a conditional promise of marriage was what finally induced her to yield. *State v. Price*, 412.

**Same: Evidence.** The question of whether the prosecutrix in this case yielded in consequence of defendant's false promise, protestations of love, deception or other artifice, is held under the evidence to have been for the jury. *Idem.*

**Same: Evidence.** Where the question of sexual intercourse is reduced to a mere matter of barter and sale, as a promise of future marriage in exchange for present sexual favors, it will not amount to seduction; but where a young girl yielded her virtue to one professing love and affection, had previously made her a promise of marriage and insisted that under the circumstances there was nothing wrong in the indulgence, the fact that she required him to renew his promise that he would marry her if anything happened was not sufficient to preclude his conviction for seduction. *Idem.*

**Self-defense: Evidence.** One may rightfully expel a person from his premises and forbid him to re-enter; but having expelled him he should cease the use of force and permit the intruder to depart, unless instead of departing the intruder is still seeking an opportunity to do bodily injury, and then there is no obligation to retire at the risk of a vicious assault. Under the evidence in the instant case the question of whether the defendant was in such real or apparent peril as to justify an extreme measure of self-defense was for the jury. *State v. Baker*, 126.

## EVIDENCE IN CRIMINAL CASES.

**Admission: Discretion.** The discretion of the trial court in admitting evidence on rebuttal which was properly a part of the state's main case will rarely be interfered with on appeal. *State v. Sorenson*, 534.

**Evidence of accomplice: Corroboration.** The uncorroborated testimony of a confessed accomplice is not sufficient to convict one of a crime; and the corroborating evidence must connect defendant with the offense, and be independent of the mere showing of its commission or the circumstances thereof. It is not necessary, however, that the accomplice be corrob-

## CRIMINAL LAW Continued

rated in every material fact; it is sufficient if some of the material facts are so corroborated that the jury is satisfied with their truth, and are thus induced to believe that his entire testimony is true, though not otherwise corroborated. The accomplice in this case is corroborated by sufficient evidence to connect defendant with the offense and to sustain conviction. *State v. O'Callaghan*, 545.

**Admission of evidence: Prejudice.** On a prosecution for breaking and entering, in which defendant testified that he had no talk with an accomplice about meeting any person prior to the burglary, and that he did not agree to meet any one afterwards, and that the accomplice had not told him that he agreed to meet any one at a specified place, defendant was not prejudiced by refusal to permit him to state whether he had arranged to meet the other parties to the crime at any particular place, or if he had so agreed to state the place. *Idem*.

**Same.** Where a confessed accomplice testified that he had not been promised immunity because of his attitude in the matter, but that he hoped to get off easier, refusal to permit his cross-examination as to whether he had ever been tried on the charge against him, or had pleaded guilty or not guilty, was not prejudicial to defendant. *Idem*.

**Same.** Refusal to permit the cross-examination of an accomplice as to the business of his wife before he married her, and concerning their prior relations, was proper. *Idem*.

**Same.** Where the defendant was permitted to deny any inference to be drawn from the evidence of the state that he unlocked the windows of the buildings burglarized prior to the burglary, he was not prejudiced by a refusal to permit him to state whether he was in the basement of the building where the window was opened and who was with him. *Idem*.

**Evidence of good character: Instruction.** Where the state relied almost wholly upon circumstantial evidence, an instruction that the previous good character of defendant could be considered for the purpose of rebutting the presumption of guilt arising from such testimony, and that it should be considered in its bearing upon the whole case, regardless of the conclusive or inconclusive character of the testimony, and given such weight as the jury thought it entitled to, was proper, and not subject to the objection that it told the jury it could only be considered where circumstantial evidence was relied upon. *Idem*.

## CRIMINAL LAW Continued

**Impeachment of witnesses.** Where the defendant in a criminal action calls one of the witnesses examined by the state and makes him his own witness, he becomes subject to impeachment on rebuttal the same as any other witness for the defendant. *State v. Warner*, 111.

**Res gestae.** The statements of a third person regarding the circumstances of an affray made to a physician when calling him to attend the injured person are admissible as part of the *res gestae*. *Idem*.

**Evidence: Instructions: Harmless error.** Where a witness for defendant testified that neither he nor defendant had been drinking on the day of the accident and were not intoxicated at the time, evidence of the condition of the witness when calling a physician shortly afterward and of statements regarding their drinking, when limited to the question of intoxication of the witness, was not prejudicial. And where the court charged that the evidence could only be considered on the question of whether the witness was intoxicated at the time of the accident, refusal to charge that it could not be considered as proving that defendant was shooting at decedent's hat when he was injured was not erroneous; especially as it will be assumed that the jury followed the instruction. *Idem*.

**Photographs.** Photographs of the surroundings of the place where a crime was committed are admissible in evidence, when the surroundings are material; and although the photographer was permitted to speak of a certain point in connection with the photograph as the place where the crime was committed, it was not prejudicial to the defendant, where it was conceded that he had no personal knowledge of the fact and it was clear from his testimony that he referred simply to the place as pointed out to him. *State v. Baker*, 126.

**Evidence of reputation: Competency of witness.** Witnesses acquainted with the reputation of a defendant for truth and veracity in his own neighborhood may testify to the same, although they may reside elsewhere; the fact that they reside elsewhere going simply to the weight to be given their evidence. *Idem*.

**Expert evidence: Conclusion.** Where it was shown without dispute that defendant struck deceased with a stick, thus crushing his skull and producing death, a physician called to the relief of deceased immediately after the injury could properly state that the blow was a severe one, and his statement was not

## CRIMINAL LAW Continued

an invasion of the province of the jury or prejudicial to the defendant. *Idem.*

**Same.** As indicated by the appearance of a wound upon the head, a physician may state the nature of the instrument with which it was inflicted; and if more than one wound he may state that the other was the probable result of a second blow, even though there was no other evidence that more than one blow was struck. *Idem.*

**Immaterial evidence.** The admission of immaterial evidence not reasonably calculated to mislead the jury or affect its verdict is not ground for reversal. *Idem.*

**Production of witnesses on notice: Sufficiency of notice.** Defects in a notice of the calling of a witness not before the grand jury are not fatal unless prejudicial to the defendant. In this instance the name of the witness was not correctly written in the notice, nor was the occupation given other than as wife, but the notice gave her residence and what she would testify to, so that the defendant could not have been misled as to her identity, and it was therefore sufficient. *State v. Butler*, 163.

## INSTRUCTIONS IN CRIMINAL CASES. :

**Assault: Duty to retreat.** Where the court's instructions as a whole relating to the duty of a person assaulted to retreat are a correct statement of the law, and clearly embody the rule of a requested instruction, a refusal of the request is not erroneous. *State v. Baker*, 126.

**Self-defense.** The right of self-defense involves the right to kill under certain circumstances; and where the defense was based upon the right to take the life of the alleged assailant, use by the court of the term "right to kill" in its instructions relative to the law of self-defense, was not prejudicial because placing the defendant in the unfavorable attitude of contending for the right to take life, rather than the mere right to defend himself by the use of adequate force. *Idem.*

**Malice.** Malice essential to the crime of murder is such anger and ill will as indicates a wicked and corrupt intent, a condition of heart and mind having no regard for social or moral obligations; mere anger or ill will accompanied by any thought of doing bodily harm to him who is the object of dislike is not sufficient. The court's instructions in the instant case, when considered as a whole, are not subject to the objection

## CRIMINAL LAW Continued

that they permitted a finding of murder if defendant was merely angry when he struck the fatal blow. *Idem*.

**Assault.** Where the court in its instructions sufficiently included the elements of an assault, and charged the jury that if defendant was attacked by deceased he could lawfully defend himself by force reasonably proportionate to his peril, even to the taking of life if reasonably apprehensive that his own life was in danger, a more technical definition of assault in such cases was not required, in the absence of a request therefor. *Idem*.

**Cautionary instructions.** The propriety of a cautionary instruction concerning the duty of the jury rests largely in the discretion of the court, and where nothing appears to suggest its inappropriateness error can not be predicated upon the giving of such an instruction. Thus an instruction in a prosecution for murder warning the jury against an arbitrary exercise of its power to convict of a lesser offense, or to acquit, was not inappropriate in the instant case. *State v. Wilson*, 698.

**Flight as indicative of guilt.** Where the court told the jury that if they found the crime was committed as charged, and that if the defendant knew or had reason to know that the persons from whom he ran, if he did run, were officers, and that if he ran away from them or attempted to escape arrest, then they could consider such flight as a circumstance *prima facie* indicative of guilt, to be considered with all the evidence in determining the guilt or innocence of defendant, was not erroneous as charging that flight is *prima facie* indicative of guilt. *State v. O'Callaghan*, 545.

**Self-defense.** An instruction that the danger justifying a killing in self-defense need not be real, but such as to lead a reasonably prudent man to believe in its reality, and in estimating the imminence of the danger and means of avoiding it, or of the force necessary to repeat it, the excitement and confusion of the surrounding circumstances must be considered, and the person threatened is not held to the same deliberate judgment as a person unaffected by danger, but should be judged only as a reasonably prudent man under the peculiar circumstances, was as favorable to defendant as the instruction requested and refused by the court in the instant case, except as to the erroneous statement to be inferred from the requested instruction that the right of self-defense exists between men engaged in mere quarreling or controversy. *State v. Baker*, 126.

CRIMINAL LAW Continued

to

DAMAGES

**Same.** Although a paragraph of the court's instructions on the subject of self-defense, if standing alone, would erroneously permit the jury to go back to the beginning of the quarrel and consider who was right on the question over which the controversy originally arose, still if construed in connection with other parts of the charge immediately associated therewith it was clear that such was not the intent or meaning of the instruction as a whole it will not be held erroneous. *Idem.*

**Reasonable doubt.** Where there is a reasonable doubt of defendant's guilt of the crime as charged he can only be convicted of the lower degree. The court's instructions in this case when construed as a whole gave the defendant the benefit of the statute in this respect. *State v. Butler*, 163.

**DAMAGES.** See CONTRACTS — FENCES — PHYSICIANS — MUNICIPAL CORPORATIONS — SLANDER AND LIBEL.

**Instruction: Presumption.** Where there was no evidence that decedent's harness was injured in a collision of his horse with an automobile, and no evidence of its value, it will be presumed that the jury followed the instruction of the court, directing them to allow damage to the harness only in the event damage was proven; and it will also be presumed that no damage was allowed on that account, but if any damage was allowed on that account it must have been small, and no reversal should be ordered. *Scott v. O'Leary*, 222.

**Market value: Evidence.** Where it is shown that there was a regular and well established market for secondhand goods, the measure of damages for the wrongful taking of the same was the retail value of the goods in the market and not their actual value; for as a general rule actual value can not be shown, until it is made to appear that there was no market value. *Worrell v. Des Moines Retail Grocers' Ass'n*, 385.

**Personal injury; Judgments: Erroneous allowance of interest.** Interest should not be computed from the date of an injury on an award of damages for pain and suffering, and an instruction authorizing the same was erroneous. In the instant case judgment was entered on the verdict including such interest, but on a motion for new trial on that ground the court eliminated the erroneous allowance, which was ascertainable, and entered final judgment for the balance as of the date of the original judgment. *Held*, that this was the equivalent of granting a new trial on condition that plaintiff should not accept judgment for the reduced amount, and was a substitute for

DAMAGES Continued TO DRAINAGE  
the judgment first entered and was proper. *Staley v. Forrest*, 188.

**DEEDS.** See CONVEYANCES.

**DIVORCE.** See MARRIAGE AND DIVORCE.

## **DRAINAGE.**

**Appeal: Petition: Sufficiency.** A party appealing from an assessment for drainage purposes made by a board of supervisors, who sets out in his petition the several assessments reported to the board and the amount thereof, the objections made thereto and the confirmation of the assessments, and follows the same by specific objections and the grounds upon which he demands a reduction, sufficiently complies with the statute requiring that he shall file his petition at the next succeeding term of court, setting forth the order or decision appealed from and his claim and objections relating thereto. *Rystad v. Drainage Dist. No. 12*, 85.

**Same: Assessments: Presumption.** On appeal from a drainage assessment made by the commissioners it will be presumed that they have considered all the evidence bearing on the question of benefits, in the absence of a contrary showing; but if it appears that they have refused to consider evidence having a legitimate bearing on the question of assessments, and the trial court has rectified the error by a proper modification of the assessments, its finding will not be disturbed. In this instance the assessments as reduced by the trial court are upheld. *Idem*.

**Assessments: Waiver of objection: Penalty: Statute.** A statute authorizing the assessment of private property for a public improvement will be construed most favorably to the property owner, and his burden will not be increased by implications not clearly necessary. Under this rule the statute providing that the owners of land assessed for drainage purposes may waive in writing any objection to the validity of the assessment and thus obtain the right to pay the assessment in installments with six percent interest per annum, is held to provide a special contract governing the rate of interest after maturity of an installment as well as before, and such waiving owners are not liable for the penalty which the statute provides shall attach to the delinquent assessments of those who do not thus waive objection. *Fitchpatrick v. Fowler, County Treas.*, 215.

**DRAINAGE Continued**

**Assessments of benefits: Review on appeal.** The fact that many considerations enter into the assessment of benefits in drainage cases by a board of supervisors will not relieve the courts, on appeal, of the responsibility of trying such questions anew, when properly presented, although the action of the supervisors will not be lightly interfered with. *Pollock v. Board of Supervisors of Story County*, 232.

**Comparison of benefits.** On appeal from an assessment of benefits to a particular tract it is not necessary that a comparison of the assessment with that of all the other tracts in the district be made, to entitle the question to consideration. Just how wide a range the comparison should take is a matter of judgment in each case, to be exercised by the complaining party at his peril. *Idem*.

**Assessments: How determined.** The cost of constructing a drain across a particular tract within a drainage district is not the basis for making the assessment to that tract; and even though the assessment as made by the supervisors is less than the average cost per acre of construction the drain across that tract, it may not be equitable as compared with the assessment of other tracts. A reduction of the assessment in the instant case by the lower court is held proper. *Idem*.

**Equality of assessment: Apportionment of cost.** The drainage law requires that there shall be equality in the assessment of lands so far as possible and that those receiving the greater benefit shall bear the greater burden; but the manner of equitably apportioning the cost, expenses and damages is left to the commissioners, and they may charge certain lands specially benefited by some feature of the work with a certain part of the cost, in addition to their proportion of the general expense. *Fardal Drainage Dist. v. Board of Supervisors of Hamilton County*, 590.

**Change in plan of construction.** Slight but unimportant changes in the original plan of drainage, the cost of which is wholly paid by those landowners benefited, is not ground for objection by an owner not affected thereby. *Idem*.

**Natural water course.** A water course is a natural stream of water usually flowing in a definite channel and discharging itself into some other stream or body of water. Its origin need not be exclusively the work of nature, but may be aided by the hand of man; and if, after becoming a flowing stream, it has remained in that condition for the prescriptive period it



## DRAINAGE Continued

TO

## EQUITY

becomes a water course as to the lands through which it flows and the rights of the owners thereof, and the right to divert or control it to the prejudice of riparian owners becomes fixed and settled. In the instant case previous owners made slight excavations to facilitate the flow over their lands in the natural course, and the water gradually cut a deep, wide channel along that course in which it flowed for many years, and thus it became a natural water course. *Falcon v. Boyer*, 745.

**Riparian rights: Diversion of water course: Damages: Injunction.** The owner of land through which there is a natural water course may divert the course of the stream on his own land, provided he returns the water back to its natural channel before it reaches the land of the lower riparian owner. Both the lower and upper owners are entitled to have this done, and where the water has been diverted from its natural channel and thrown upon the land of another he not only has a right of action for damages, but he may restrain the party from thus diverting the water to his prejudice. *Idem*.

**Damages.** Where one is permanently enjoined from diverting the water of a stream from its natural course by means of a ditch, on the theory that it is a continuing injury to plaintiff, he should not at the same time be charged with damages on the theory that the injury was permanent, and thus be compelled to pay apprehended injury from a continuance of the ditch. *Idem*.

**Surface water: Nuisance: Damages: Evidence.** A landowner may collect the surface water upon his land in a channel and discharge it into a natural swale or depression, and unless he substantially increases the volume, or discharges it in a negligent manner so as to injure his neighbor, he is not guilty of creating a nuisance, nor is he liable in damages; and he may thus drain the sloughs and wet places, but is not at liberty to discharge the water from large lakes or ponds on his land onto the land of others. The evidence in this case is held insufficient to show that defendant exceeded his lawful rights. *Jontz v. Northup*, 6.

**EASEMENTS.** See REAL PROPERTY.

**EQUITY.**

**Cancellation of instruments: Equitable jurisdiction.** The cancellation of an instrument can only be obtained in an equitable action. So that where plaintiff pleaded a contract, its breach,

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TO

**ESTOPPEL**

and demanded liquidated damages, and defendant admitted its execution but denied its effectiveness because of certain conditions, and in a cross-petition pleaded fraud and asked a cancellation of the contract, the court properly transferred the cause to the equity side of the docket. *Weseman v. Graham*, 430.

**Specific performance.** Specific performance of a contract is a matter of equity rather than strict right. *Healy v. Hohn*, 375.

**Specific performance: Condition precedent.** Where a contract to convey real estate was signed in triplicate by the husband alone, with the understanding that the wife was to sign one copy and when this was done the papers were to be exchanged, her signature was a condition precedent to the consummation of the contract, without which specific performance will not be decreed. *Idem*.

**Specific performance.** Where the contract to convey land, all subject to a mortgage and including the homestead, was not signed by the wife and upon request she refused to sign the same, and subsequently the land was sold to others who purchased in good faith, specific performance of the contract was properly refused on the ground that it might be detrimental to the interests of the wife and lead her into litigation. *Idem*.

**Appeal: Review.** On an issue of specific performance which is close in its facts some weight will be given the finding of the trial court, although the action is triable anew on appeal. *Idem*.

**ELECTION BY WIDOW.** See **WILLS**.

**ESTATES OF DECEDENTS.** See **WILLS**.

**Administrator's sale: Good faith purchaser.** The purchaser at an administrator's sale for the payment of debts takes only such title as the deceased had; he is not entitled to protection as a purchaser in good faith. *Stephens v. Boyd*, 570.

**Conveyances: Title.** Where testator's daughter to whom he had both conveyed and devised property, the title not to vest until the death of testator, conveyed the same prior to his death and her grantee immediately recorded his deed, the title passed to her grantee by virtue of her deed immediately upon the death of the testator. *Idem*.

**ESTOPPEL.** See **CONTRACTS — HIGHWAYS — MUNICIPAL CORPORATIONS — PUBLIC LANDS — REAL PROPERTY**.

## EVIDENCE

**EVIDENCE.** In Criminal Cases see CRIMINAL LAW — See CONTRACTS — CONVEYANCES — INSANITY — PARENT AND CHILD — SLANDER AND LIBEL.

**Admission of evidence: Harmless error.** In this action for injuries to decedent by collision of his horse and carriage with an automobile, evidence of the admissions of decedent with reference to his conduct with another horse and carriage, more than a year previous, was not reversible error, even if erroneously admitted. *Scott v. O'Leary*, 222.

**Adoption of ordinances.** The testimony of the town clerk that a record book of the council offered in evidence showed the proceedings relative to the passage of a speed ordinance was competent for the purpose of identification. It was also competent for him to state that the ordinance was signed by the mayor and published according to law. *Powers v. Railway*, 347.

**Sufficiency of objection.** The general objection that testimony is incompetent, irrelevant and immaterial is not sufficiently specific to present the objection on appeal that the evidence was inadmissible as hearsay. *State v. Wilson*, 698.

**Communications with a decedent: Waiver.** A witness interested in the result of the suit is not competent to testify to transactions or communications with a deceased party; but if the other party calls him as a witness he waives the objection to his competency as to those matters inquired about. *Nothem, Exr'x v. Londergan*, 146.

**Expert evidence: Weight: Determination.** It is the province of the jury to determine the relative value of the opinions of all witnesses, including experts. *Lang v. Lang*, 300.

**Examination of witness: Discretion: Prejudice.** Refusal to permit a witness to state on direct examination how he arrived at his conclusion regarding a certain distance to which he had testified was not an abuse of discretion, nor was it prejudicial, where it developed on his cross-examination that he had seen the measurements made. *Hoffman v. Railway Co.*, 655.

**Cross-examination.** The cross-examination of expert witnesses is largely a matter of discretion; and where it was not apparent what bearing the rejected evidence would have upon the issues, or that it would tend in any way to modify the testimony already given by the witness, its rejection was not re-

## EVIDENCE Continued

versible error. In the instant case the evidence sought was the subject of direct testimony and not to be elicited on cross-examination, where it had not been referred to on direct examination. *Idem*.

**Husband and wife: Competency as witnesses against each other.**

The forging of a wife's signature by her husband to an obligation for the payment of money is not a crime against the wife, which will permit her to testify against her husband on his prosecution, either under the common law or the statute, but the crime is against the person induced to accept the fraudulent instrument; and the wife is not subject to punishment for contempt for refusal to so testify. *Molyneux v. Wilcockson*, Judge, 39.

**Hypothetical inquiries: Instructions.** Although the court failed to instruct that the value of expert evidence based wholly upon hypothetical inquiries depends upon the proof of the facts assumed, still in this instance the instruction was correct so far as it went, and in the absence of request for something more specific was sufficient. *Haradon v. Sloan*, 608.

**Res Gestae.** Where it was developed on the cross-examination of a witness for the state that he had made certain statements to the coroner immediately before the killing of deceased, further statements of the witness made in continuation of the same conversation were admissible as *res gestae*. *State v. Wilson*, 698.

**Impeachment evidence.** Where defendant testified that he went to the home of deceased for the purpose of obtaining money to visit a lady friend, it was competent for the purpose of impeachment to show that a short time previously he had made statements to a third person indicating that the woman in question was not of good character; the evidence not being offered as an attack upon the character of one of defendant's witnesses. *Idem*.

**Same.** A witness can not ordinarily be contradicted as to collateral and immaterial matters brought out on cross-examination, but the court in its discretion may permit the contradiction of the statements of one accused of murder, in which he gave his reasons for visiting the home of deceased where he was killed. *Idem*.

**Transactions with a decedent.** The testimony of the mother of deceased that she had given him his time, that he worked for himself, collected his own wages, owned property and con-

EVIDENCE Continued

TO

EXEMPTIONS

ducted his own business, was neither objectionable as incompetent, nor as relating to a personal transaction. *Scott v. O'Leary*, 222.

**Matters of fact and not opinion.** A witness who was at the scene of the collision of an automobile with a horse and assisted in extricating the horse, was competent to state that the machine was in gear and that the brakes were not set, over the objection that the inquiry called for an opinion and not a fact. *Idem*.

**Nonexpert evidence: Matters of observation.** A nonexpert witness is competent to testify to the appearance and actions of one who has suffered a personal injury, when confined to his own observations. *Idem*.

**Witnesses: Competency.** Deafness will not disqualify a witness otherwise competent. *State v. Butler*, 163.

**Prejudice.** The sustaining of an objection to a question which had been previously fully answered was not prejudicial. *Andreas v. Hinson*, 43.

**Stricken when not responsive.** A party is entitled to have an answer not responsive to his inquiry stricken out for that reason. *Idem*.

**Speed of train: Competency of witness.** Witnesses of average intelligence, having knowledge of time and distance, and who saw a passing train at the time of an accident, are competent to testify to its rate of speed. *Powers v. Iowa Central Ry. Co.*, 347.

**EXEMPTIONS.**

**Burial lot; Extent of exemption.** Under the statutes there is exempt to the head of a family his interest in a public or private burying ground, and upon his death the same continues exempt to the family from liability for his debts. *Swisher v. Swisher*, 55.

**Homestead: Extent of exemption.** The homestead of every family, whether owned by the husband or wife, is exempt from execution and sale, except where there is an express statutory provision otherwise; and this exemption is for the benefit of every member of the family. *Idem*.

**Same: Devise of homestead.** The acceptance of a devise of the homestead by the surviving spouse will not destroy its exempt

**EXEMPTIONS Continued**

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character in the hands of such devisee; and it is not subject to the general debts of the testator, but only such as are specially provided for by statute. The only instance in which general creditors may resort to the homestead of a deceased person is when he left no spouse and no issue. *Idem*.

**FENCES.**

**Division fences: Parol agreement: Statute of frauds: Damages.**

The oral agreement of adjoining landowners to erect and maintain a division fence, which was carried out by its erection, although not a lawful fence or one sufficient to turn stock at all times, is provable and binding upon the parties and their tenants acquiescing therein; as an agreement of that character does not contemplate any interest in the land. And where the cattle of one escaped through the other's portion of the fence, because of his negligence in failing to keep the same in repair, and were damaged thereby, the other is liable for the injury. *Nelson v. Wilson*, 80.

**FRAUD. See CONTRACTS — CORPORATIONS.**

**Fraudulent conveyances: Evidence.** In this action to set aside a conveyance from plaintiff to her son, the evidence is reviewed and held insufficient to show that the conveyance was procured through the fraud and collusion of defendants. *Parmenter v. Parmenter*, 195.

**Fraudulent conveyances: Evidence.** Although neither the contract of sale nor the deed to a tract of land refer to the number of acres conveyed, evidence of fraudulent representations as to the quantity is admissible; and where there was such evidence it was permissible to show that the sale was in fact by the acre, and that the price per acre was agreed upon. *Lenoch v. Yoss*, 314.

**Sale of land by the acre: Shortage: Damages.** Where parties to a contract for the sale of land agree upon a price per acre, and there is competent evidence of the actual acreage, the damage for a material shortage is the price per acre multiplied by the number of acres it is short. *Idem*.

**Fraudulent conveyances: Confidential relations.** To set aside conveyances from children to their parent on the ground of fraud, it must appear that the grantors were led by fraudulent practices into parting with their title; as the relationship alone is not sufficient to render the conveyances presumptively fraudulent. *Burch v. Nicholson*, 502.

FRAUD Continued

TO

GUARDIANSHIP

**Limitations.** To set aside a conveyance on the ground of fraud the action must be brought within five years after discovery of the fraud; and the recording of a conveyance in violation of an alleged agreement to hold the property in trust is such notice to the claimed beneficiaries as will set the statute in motion. And the fact that the beneficiaries may have thought that, in view of the relationship of the parties, they would ultimately receive the property, would not excuse a failure to institute the action within the statutory period. *Idem.*

**Settlement and release: Mental capacity: Evidence: Instruction.**

In this action for personal injuries defended on the ground of settlement, release and full satisfaction of all claims, the evidence is reviewed at length and it is, *Held*, that plaintiff was mentally competent to understand and realize the nature and effect of the settlement and release executed by him, and in the opinion of the majority of the court there was not sufficient evidence to take the case to the jury on the question of fraudulent representations of defendant's agent, as to what the plaintiff's physician told him regarding the probable duration of his inability to work; and that the court erred in its instructions authorizing the jury to disregard the release and settlement, if it found that plaintiff did not have sufficient mental capacity to understand the nature and effect of the same, as there was no evidence in support thereof. *Owens v. Norwood White Coal Co.*, 389.

**Same.** The law favors the settlement of controversies, even with injured and necessitous persons, if fairly and understandingly made, and especially where the claim is of a doubtful character; although it will scrutinize the same for the purpose of detecting fraud and wrong. *Idem.*

**Same.** When an injured person has fairly and knowingly settled the damages resulting from the negligence of another, the courts will not interfere simply because he was mistaken in the nature or extent of his injuries. *Idem.*

**FRAUDULENT CONVEYANCES.** See FRAUD.

**GUARDIANSHIP.**

**Appointment in vacation.** A judge of the court has authority under the statute to appoint a temporary guardian for an insane person, or an habitual drunkard incapable of managing his affairs; and the judge making the appointment may treat

## EXEMPTIONS Continued

TO

FRAUD

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FRAUD Continued

TO

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## GUARDIANSHIP Continued

to

## HIGHWAYS

a subsequent application to annul the same, though addressed to the court, as an application to him as judge to be determined in vacation; as the mere setting aside of a temporary appointment is in no manner a trial on its merits for the appointment of a permanent guardian. *Holly v. Holly*, 584.

**Vacation of temporary appointment.** Section 3222, providing that at any time not less than six months after the appointment, the person under guardianship may apply to the court or judge for a termination of the same, has reference to a permanent guardianship and not a temporary appointment; the latter appointment granted on an *ex parte* application may be set aside at any time. *Idem*.

**Jurisdiction: Residence.** The evidence is reviewed and held to show that the ward for whom it was sought to have a guardian appointed was not a resident of the county in which the proceeding was pending, and the finding of the trial court to that effect was conclusive on appeal. *Idem*.

**Same.** A guardianship proceeding is *in personam*, and the court has no jurisdiction over an incompetent who is a resident of another county, and has no property within its jurisdiction for which it is essential that a guardian be appointed; and the mere fact that some person in the country held money belonging to the ward will not confer jurisdiction. *Idem*.

**Change of place of trial.** A guardianship proceeding is a special proceeding, to which the statute relating to the removal of a cause to the county of defendant's residence is not applicable. *Idem*.

**Insane persons.** One who is not possessed of sufficient mental capacity to preserve his property, but is subject to the will of others in the disposition of the same, should have a guardian appointed for him. The fact that he may become subject to the will of others at some future time is not sufficient ground for the appointment, however. *Lang v. Lang*, 300.

## HIGHWAYS.

**Removal of obstructions: Parties.** A township road supervisor has authority to maintain an action to remove an obstruction from a highway, and where he joins with the township trustees as plaintiff, the right of the trustees to maintain the action is immaterial. *Liberty Township v. Doolittle*, -210.

**Same: Adverse possession: Estoppel: Evidence.** Title to a

## HIGHWAYS Continued

TO

## INJUNCTION

highway can not be acquired by adverse possession, although inclosed by fences and occupied by adjoining owners for more than ten years; but a highway may be so occupied that the public will be estopped from claiming it. 'In the instant case the evidence is held insufficient to estop the public from claiming the highway. *Idem*.

**Same: Removal of obstructions: Injunctions.** Where a landowner assisted in erecting an obstruction in the highway, and a codefendant asserted that it would have been replaced if removed by the road supervisor, they were properly enjoined from interfering with the highway upon removal of the obstruction by the supervisor. *Idem*.

**HOMESTEAD.** See EXEMPTIONS.

**HUSBAND AND WIFE.** See CRIMINAL LAW.

**INDICTMENT.** See PHYSICIANS.

**INFANTS.** See CONVEYANCES.

**Emancipation of minor: Evidence: Sufficiency: Waiver: Instruction.** Even if the testimony of a brother of decedent that decedent, a minor, had been living in his family, attending to his own business and drawing his own wages, was not sufficient to show his emancipation, the mother's evidence that he had been emancipated was sufficient, in the absence of an objection on the trial that she was not the proper person to emancipate him; and as such objection was not made prior to submission of the appeal, it was waived, and failure to show that the father was not living was not material. *Scott v. O'Leary*, 222.

**INJUNCTION.** See HIGHWAYS — INTOXICATING LIQUORS.

**Mandatory order.** Primarily the office of an injunction is to restrain rather than to compel the performance of an affirmative act; but if required to effectuate the principal purpose of the order the defendant may be required to do some affirmative act. *Falcon v. Boyer*, 745.

**Nuisance: Water courses: Inadequate legal remedy.** Where the injury resulting from a nuisance is of a permanent character, and the damage flowing therefrom is original and can be compensated in one suit, the injured party has a plain, speedy and adequate remedy at law; but where the injury is not of a permanent character and is subject to change without the intervention of human agency equity will intervene by way of

## INJUNCTION Continued

TO

## INSANITY

injunction to protect the rights of the injured party. Thus equity will restrain the diversion of water from a natural stream by means of a ditch which is subject to change from time to time by the action of the water, so that the injury is continuing; especially where future injury is to be reasonably apprehended. *Idem.*

**Restraining action in another state.** Injunction will lie to restrain residents of this state from prosecuting fraudulent, collusive or unlawful proceedings in the courts of another state. *Reed v. Hollingsworth*, 94.

## INSANITY.

**Delusions: Evidence.** An insane delusion is a belief in something impossible in the nature of things, or the circumstances surrounding the afflicted person, and which refuses to yield to evidence or reason. And where such belief, owing to its character, is probably unfounded yet might be true, its truth will not be assumed in the absence of evidence. Thus evidence in a guardianship proceeding that defendant's former wife was industrious, and that his children were obedient, was admissible to show that his belief in a conspiracy between them to obtain his property was a delusion; but evidence of that character which was merely the expression of an opinion is not admissible, and a comparison of the conduct of his children with those of his neighbor's was immaterial. *Lang v. Lang*, 300.

**Same.** In a proceeding to appoint a guardian for the father of petitioners and to set aside conveyances to his second wife, made as part of a contract with her for support during life, on the ground of mental incapacity, evidence of his first wife's devotion, the custom and habits of his children, and that he was profane and applied vile epithets to his former wife and children, was admissible for the purpose of refuting his belief of a conspiracy on their part to deprive him of his property, but not as direct evidence of mental unsoundness. *Idem.*

**Same.** The record in this case is held to contain sufficient evidence to indicate that defendant's belief that his first wife and children conspired to rob him of his property was a delusion. *Idem.*

**Same.** A copy of an account rendered by a son who managed his father's farm, showing the sale of stock from the farm, was the best evidence available on the subject, and admissible

## INSANITY Continued

TO

## INSTRUCTIONS

to refute the father's belief that he was being robbed by his family. *Idem.*

**Same.** Evidence that defendant's second wife was guilty of lascivious conduct, not shown to have been known to defendant, or that a suit had been instituted against her for alienation of affection by the wife of another, was immaterial to any issue in this case; but defendant's testimony that he had no knowledge of facts derogatory of her morals prior to their marriage was competent, as tending to rebut any inference which might have been drawn from a knowledge of her character. *Idem.*

**Same: Nonexperts: Scope of cross-examination.** A nonexpert witness is permitted in the first instance to give his opinion of the sanity of a person, only after detailing the facts within his personal observation upon which the opinion is based; and he is not subject to cross-examination by a series of hypothetical questions involving practically every phase of the case. *Idem.*

**Evidence.** One entertaining the suspicion that his wife and children were seeking to deprive him of his property should be permitted to show that they consulted a lawyer regarding a settlement or division of the property, when charged with an insane delusion in that regard as ground for the appointment of a guardian. *Idem.*

**Same.** That one for whom it was sought to have a guardian appointed on the ground of insanity, because having conveyed his property to his second wife, bought and sold real property of large value without making an examination of it, was admissible on the issue of his mental condition. *Idem.*

**Same: Examination of one charged with insanity.** Great latitude should be allowed in the examination of one for whom it is sought to have a guardian appointed on the ground of insanity. His recollection and understanding of business transactions; his manner of speech, memory, and the state of his health; his ability to comprehend what he had done and was about to do; the accuracy of his judgment, and generally all matters calculated to aid the jury in determining his condition of mind, are proper subjects of inquiry. *Idem.*

**INSTRUCTIONS.** See CRIMINAL LAW — DAMAGES — NEGLIGENCE — RAILROADS — SLANDER AND LIBEL.

**Reference to pleadings.** Where the amended petition was

## INSTRUCTIONS Continued

## TO

## INSURANCE

treated by the court in its instructions as the petition in the case, and the jury had no knowledge of any other petition, subsequent reference in the instructions to the allegations of the petition was not erroneous. *Hoffman v. Railway Co.*, 655.

**Withdrawal of issue: Prejudice.** Where it was alleged that defendant's street car was operated at a dangerous, reckless and illegal rate of speed, but there was no evidence that the speed was illegal, withdrawal from the jury of any claim that the car was operated at an illegal rate of speed was not erroneous, on the ground that the jury might have been thus led to believe that no issue remained concerning the dangerous and reckless speed. *Idem*.

**Prejudice.** Where the defendant was entitled to a verdict in any event, an error in the instructions was not prejudicial to plaintiff. *Scott v. Wilson*, 31.

**Submission of issues: Prejudice.** No prejudice to the defendant resulted in this case by copying the pleadings, alleging several grounds of negligence, into the instructions; as the court thereafter clearly defined the issues and limited consideration by the jury to certain specific grounds of negligence actually submitted. *Johnson v. Corn Products Refining Co.*, 420.

**INSURANCE.**

**Accident insurance: Evidence.** In this action for the accidental death of insured the evidence is held to be in conflict as to whether deceased came to his death from drowning, or from the rupture of an artery, while bathing, and to require submission of the case to the jury. *Brinsmaid v. United Commercial Travelers*, 651.

**Indemnity against automobile accidents: Legality.** Neither subdivision 5-cl. 1, nor subdivision 5-cl. 2, of section 1709 of the Code Supplement of 1907, authorize the issuance of a policy indemnifying the owner or driver of an automobile, who is not an employer, against liability for damages resulting from an accident caused by the negligence of such owner or driver in operating the machine; as the first subdivision limits indemnity to personal injuries suffered by the insured himself, and not against liability for some negligent or wrongful act of his; and the second authorizes indemnity to an employer only, as against liability arising out of some act of his employee, and prohibits liability insurance not therein authorized. *American Fidelity Co. v. Bleakley, Auditor of State*, 442.

INSURANCE Continued

TO

INTOXICATING LIQUORS

**Foreign insurance companies: Interstate comity.** The legislature has power to prescribe the terms and conditions upon which foreign insurance companies may do business in this state, and the courts will not override the will of the legislature on the ground of interstate comity. *Idem.*

## INTOXICATING LIQUORS.

**Nuisance: Abatement: Death of party.** The death of defendant will abate an action to enjoin a liquor nuisance, even after an appeal has been taken. *Babbitt v. Corrigan*, 382.

**Same: Abatement.** Since an action to enjoin a liquor nuisance is abated by the death of defendant, the liquor on his premises can not be adjudged a nuisance and condemned, as intent to keep and sell the same in violation of law is an essential element of the nuisance, which was eliminated by his death. *Idem.*

**Appeal.** Where notice of appeal was served only on the defendant whom it was claimed maintained a liquor nuisance, the appellate court will not save the action as against the premises or the owner thereof, after the death of such defendant; and especially where the owner was not named as a defendant and there was no showing that notice was served upon him or that he appeared to the action. *Idem.*

**Petition of consent: Reputable witness.** A single illegal act of one obtaining signatures to a petition of consent to the sale of liquor, done several years prior to obtaining the signatures, is not alone sufficient to disqualify him as a subscribing witness thereto, under the statute requiring that the signatures shall be accompanied by the affidavit of some reputable person. *Taft v. Snouffer*, 461.

**Signatures to consent petition.** Where voters sign their names to a petition of consent to the sale of liquor in the same manner as they appear on the poll list of the preceding election, though not in their usual and correct form, such signatures are in compliance with the statute requiring that the petitioners shall be those voting at the last election, as shown by the poll lists. *Idem.*

**Seizure: Evidence.** Where it appeared that defendants kept a restaurant and grocery store, occupying the same building as a residence, and that a barrel of beer belonging to them was kept in the grocery department, a *prima facie* case was made authorizing seizure of the beer, as having been kept for un-

## INTOXICATING LIQUORS Continued

to

## JUDGMENTS

lawful sale; and the question of whether the beer was owned and kept by defendants for their personal use was for the jury, under the evidence, and the order discharging the defendants and exonerating the bond was erroneous. *State v. Johnson*, 248.

**JUDGMENTS.** OF JUSTICE OF THE PEACE — See MARRIAGE AND DIVORCE.

**Former Adjudication.** Where the plaintiff in an action to enjoin the removal of a common stairway was not a party to a proceeding to sell the adjoining lot for the payment of the owner's debts after his death, and the right to use the stairway was not involved in that proceeding, the judgment entered therein was not an adjudication of his rights in the easement. *Stephens v. Boyd*, 570.

**Former adjudication.** The judgment in an action to enjoin the enforcement of special assessments, in which the city joined with the contractor and certificate holders as a party defendant, that the cost of the improvement could not be taxed against the plaintiff in that case and enjoining a further levy, but not determining any question between the city and its co-defendants, was not an adjudication of the right of the assignees of the holders of the certificates to enforce the same in a subsequent action. *First National Bank of Red Oak v. City of Emmetsburg*, 555.

**Former adjudication: Submission of issue.** In this action for the wrongful levy of an execution on exempt property, the defendant pleaded an adjudication of the question of exemption, relying upon a judgment rendered by a justice of the peace. The evidence tended to show that the cause before the justice was continued by agreement of parties, when judgment was entered. *Held*, that the issue of adjudication was in the case and that the court erred in refusing to submit it to the jury by proper instructions. *Worrell v. Des Moines Retail Grocers' Assn.*, 385.

**Former adjudication.** To constitute a former adjudication there must be an identity of subject matter, cause, parties and of quality of the persons: Thus in an action by remaindermen against those claiming under the life tenant who foreclosed a mortgage on the property and held it adversely for the statutory period, the judgment between the plaintiffs and a third person in the partition of other land owned by plaintiff's



## JUDGMENTS Continued

TO

## JURORS

testator was not an adjudication of plaintiff's rights in this action. *Mitchell v. Vest*, 336.

**Extent of lien.** A judgment lien is purely a creature of the statute, which is applicable alike to both legal and equitable interests in lands; but the lien does not attach to the land or create any property right in the judgment creditor; it simply attaches to the debtor's interest in the land, and if his interest is subject to any infirmity or condition by which his interest ceases to exist the lien ceases with it. *Hunter v. Citizens Savings & Trust Co.*, 168.

**Same: Interest of legatee: Extent of judgment lien.** Where the executors were empowered by the terms of the will to sell the real estate to pay debts and legacies, a judgment creditor of one of the devisees, who was given an undivided interest in the residue of the estate, acquired no lien upon the land by virtue of the judgment which could be enforced against it in the hands of a purchaser from the executors, even though he purchased with notice of the judgment; the purchaser taking title through the executor and not through the judgment debtor. *Idem*.

**JURISDICTION.** See ACTIONS — CORPORATIONS — CRIMINAL LAW — GUARDIANSHIP — MARRIAGE AND DIVORCE.

**JURORS.**

**Competency: Waiver of objection.** The mere fact that a defendant in a criminal case may have talked with one of the jurors who was confined in the jail with him would not render the juror incompetent, unless he received some information or impressions tending to bias his judgment and prejudice him against the accused; and if such was the fact and it was discovered during the trial, it was the duty of the defendant to make the objection then, rather than speculate on a favorable verdict and in the event of disappointment insist upon the juror's incompetency as the basis of a motion for new trial. *State v. Baker*, 126.

**Same.** The fact that after the jury had agreed upon a verdict of guilty and were waiting for the judge to deliver the same to him, one of the jurors suggested that defendant was of the same name as a person reported to have committed a previous murder, was not ground for new trial, in the absence of evidence that any juror was influenced by the suggestion, or that the verdict as prepared would have been repudiated by any member of the panel. *Idem*.

**JUSTICE OF THE PEACE.**

**Judgments: Conclusiveness.** The judgment of a justice of the peace is as conclusive upon the parties, concerning all matters adjudicated, as that of any other court; and where a judgment was entered at an adjourned date agreed upon by the parties, even though beyond the statutory period for judgment without consent, it is binding upon the parties, and they are as effectively estopped thereby as if entered in any other court. *Worrell v. Des Moines Retail Grocers' Assn.*, 385.

**LANDLORD AND TENANT.**

**Lien: Notice: Enforcement.** Subsequent purchasers are charged with notice of a provision creating a lien for rent in a duly executed and recorded lease of property; and where the provision was definite with respect to the extent of the lien and the property to which it attached, the fact that it was in general terms and resembled the landlord's statutory lien, in no manner affected its validity, or the right to enforce it in equity. *Maine v. Constantine*, 625.

**Claim for rent: Evidence.** The evidence respecting the amount due on certain rent notes is reviewed and held to support the finding of the trial court. *Idem.*

**Waiver of lien: Fraud.** The execution of a new lease, with the understanding that the amount still due on the prior lease should be satisfied, is not a waiver of the lien under the original lease: Nor could fraud be inferred from the fact that plaintiff sued for more than was in fact due him. *Idem.*

**Enforcement of lease: Parties.** One having no interest in a lease or the enforcement of the same at the time action was instituted for that purpose was not a necessary party defendant; the maker of the lease and rent notes and the present owner of the property were the only necessary parties. *Idem.*

**LARCENY.** See CRIMINAL LAW.

**LEASES.** See LANDLORD AND TENANT.

**LICENSE.** See PHYSICIANS.

**LIENS.** See JUDGMENTS — LANDLORD AND TENANT.

**LIMITATION OF ACTIONS.** See CONVEYANCES — FRAUD — TRUSTS.

## MARRIAGE AND DIVORCE

**MARRIAGE AND DIVORCE.****Divorce: Cruel and inhuman treatment: Alimony: Evidence.**

In this action by the wife for divorce and alimony on the ground of cruel and inhuman treatment, the evidence is reviewed and held to support a decree for plaintiff, and an allowance of \$5,000 permanent alimony. *Barr v. Barr*, 153.

**Divorce: Appearance: Waiver of defects in notice and petition.**

Where the defendant appeared and filed answer in a divorce action, in which the parties were correctly named, a defect in the names of the parties in the original notice and petition was waived; and the final decree in which they were correctly named will be held to have been entered after the errors were corrected by amendment or otherwise, in support of the jurisdiction of the court. Besides the error in names in this instance was not such as to avoid a decree properly entered. *Richardson v. King*, 287.

**Pleadings: Waiver of defects.** The parties to a divorce suit can not consent to a decree, or by agreement confer jurisdiction; but where the jurisdictional facts existed and the defendant appeared and joined issue on certain alleged grounds of divorce, without challenging the sufficiency of the petition in any respect, he will be held to have waived defects in the petition, the same as in other cases, in a collateral attack on the decree. *Idem.*

**Same: Jurisdiction: Presumption.** In support of a judgment of divorce against a collateral attack, the appellate court will assume that the trial court found it had jurisdiction and that all matters necessary to that jurisdiction were established. *Idem.*

**Cancellation of decree: Collateral attack.** Courts are slow to set aside a decree of divorce after a second marriage has taken place; and where third parties seek by collateral attack to avoid a decree which is fair on its face, for the purpose of rendering the second marriage illegal and thus depriving the surviving spouse of a share in the property of decedent, they must show that the former decree of divorce was absolutely void for want of jurisdiction. *Idem.*

**Parties.** A resident defendant in a divorce action is a necessary party to a suit to set the decree of divorce aside, whether the action is a direct or collateral attack upon the decree. *Idem.*

**Marriage: Action to annul.** Where an apparently valid decree

**MARRIAGE AND DIVORCE Continued**

was granted the wife and she married another, a suit to annul the second marriage, on the ground that the decree of divorce was granted without jurisdiction, should be brought during the life of the second husband. *Idem.*

**Common law marriage.** Cohabitation and the reputed relation of husband and wife may be shown as tending to establish the relation of husband and wife and the mutual recognition of the existence of a marriage, the fundamental inquiry being the mutual intent of the parties, which will be established if it appears that they have lived together intending thereby to become husband and wife; but neither the intention nor consent to the status of marriage can be inferred from cohabitation alone, and reputation will only be considered as bearing on the question of intent. In re Estate of Boyington, 467.

**Evidence.** The evidence in this case is reviewed and held insufficient to establish a common law marriage, although tending to show cohabitation, and that in their business relations the parties acted in some respects as husbands and wives usually act. *Idem.*

**Same.** Where the evidence shows a divided reputation in the community on the question of a common law marriage it is without probative effect. *Idem.*

**Same: Cohabitation.** Where cohabitation in the beginning was illicit, affirmative proof of a present intention to assume legitimate relations as husband and wife is essential to establish a marriage. In the instant case no such intention is shown. *Idem.*

**Additional suit money: Jurisdiction.** The application in this divorce case for additional suit money, and the affidavits in support thereof, are held to show such a changed situation since the previous order was made as to give the court jurisdiction to grant the new order. Mengel v. Mengel, 630.

**Application for suit money: Evidence.** An application for additional suit money should be treated as a motion authorized by the statute for that purpose, and may be supported by affidavits to be treated as evidence on the hearing. *Idem.*

**Temporary alimony: Subsequent allowance.** An order for temporary alimony is not a final adjudication of the rights of the parties in that regard, but the court has power to make a subsequent additional allowance. *Idem.*

MARRIAGE AND DIVORCE Continued TO MECHANICS' LIENS

**Allowance of suit money.** Suit money may be allowed for the purpose of resisting an appeal from an order for temporary alimony. *Idem.*

**Jurisdiction.** A judge as such has no power to award temporary alimony; this power is limited to the court itself. *Idem.*

**Same.** To justify the reversal of an order allowing suit money it must appear that the court was without jurisdiction, or that it abused its discretion in the amount of the allowance. *Idem.*

**Allowance of suit money.** Suit money for the prosecution of an appeal from an order allowing temporary alimony can only be awarded by the appellate court; and an order of the district court allowing anything for this purpose is erroneous. *Idem.*

**Allowance of attorneys' fees.** Where attorneys' services in a divorce action were rendered in reliance upon defendant's liability therefor, and were necessary to the plaintiff's prosecution or defense of her case, the fact that they had already been performed is no objection to an allowance therefor. *Idem.*

**Same.** The fact that there had been a number of cases involving the collection of suit money previously allowed, was sufficient authority for allowing additional attorney's fees. *Idem.*

**MASTER AND SERVANT.** See NEGLIGENCE.

## MECHANICS' LIENS.

**Public buildings: Subcontractors' claims: Filing of same.** Under the statute relating to the filing of claims by subcontractors for material furnished for the construction of any public building, bridge or other improvement not belonging to the state, the filing of a claim with the treasurer of a school district, and service of notice thereof on the president and secretary of the board, is in compliance with the provision of the statute requiring that it shall be filed with the officer through whom payment is to be made. *Wackerbarth & Blamer Co. v. School Dist. of Independence*, 614.

**Insolvency of principal contractor: Effect.** While the statute above referred to does not create a lien in favor of a subcontractor it does offer him an equitable right to the unpaid funds in the hands of the corporation; and upon compliance

## MECHANICS' LIENS Continued

TO

## MINES AND MINING

with the statute in filing his claim a personal liability is created against the corporation, to the extent of the funds in its hands, which can not be defeated by a general assignment by the principal contractor for the benefit of creditors, although previously made. *Idem.*

**Effect of assignment by contractor.** The general assignment for the benefit of creditors by a contractor for public work before its completion, does not amount to an assignment of the fund for construction of the work in the hands of the corporation; the assignee takes only a right of action therefor. *Idem.*

**Statute: Preference.** The statute giving subcontractors a claim against public corporations provides for a preference which the courts can not ignore, even though distribution of the funds in the hands of the corporation under a general assignment by the principal contractor would be more equitable. *Idem.*

## MINES AND MINING.

**Negligence: Evidence.** In this action for injury to plaintiff by the falling of slate from the roof of a mine, while occupying an opening between two parallel entries constructed primarily for the circulation of air, the evidence is held to require submission of defendant's negligence in failing to support the opening. *Kennis v. Ogden Coal Co.*, 594.

**Instructions.** Where there was evidence that it was customary for miners to use the "crosscut" or opening between two parallel entries for keeping their tools and eating their lunches, and that there was no rule of the company forbidding such use, refusal of an instruction that if plaintiff was charged with knowledge of company rules excluding miners from using the opening, repeated violations of such rule would not justify plaintiff in assuming the risk involved in its use, was proper. And under the evidence the court rightly instructed that if it was customary for miners to thus use the opening, and this custom was acquiesced in by defendant, it became its duty to keep the walls in a reasonably safe condition and to make reasonably frequent inspection thereof, and that failure of defendant in this respect would render it liable, was properly given. *Idem.*

**Assumption of risk: Instructions.** An employee is bound to exercise the prudence of a reasonably careful person; but where there was no issue as to the capacity and intelligence of the plaintiff, an instruction that he assumed the dangers

MINES AND MINING Continued

TO

MUNICIPAL CORPORATIONS

and risks of the employment which an ordinary person of his capacity and intelligence would have known and appreciated in his situation, could not have been prejudicial to defendant. *Idem.*

**MISCONDUCT.** See NEW TRIAL.

**MISTAKE.** See ACCORD AND SATISFACTION.

## **MUNICIPAL CORPORATIONS.**

**Franchises: Statutory requirements: Proof of compliance.**

Under the provisions of Code, sections 683, 775, 776, a franchise to use its streets can only be granted by a majority vote of the electors of the municipality, at a regular or special election called for that purpose, which must be brought about by a submission of the question by a yea and nay vote of the council and the giving of notice; and the action of the council in authorizing a submission of the question, together with the election proceedings, must be shown by the records of the council to have been in conformity with the statutes, to establish the granting of a valid franchise; as no presumption will be indulged in favor of compliance with the statutory requirements, and parol evidence is not sufficient to establish that fact. *Farmers Telephone Co. v. Town of Washta*, 447.

**Telephones: Estoppel.** A municipality is not estopped from relying on the invalidity of a telephone franchise, where for a number of years the company made no attempt to exercise its rights thereunder by the establishment of an exchange, except to maintain a toll line into the municipality; and a decree requiring the removal of an exchange constructed under the protection of an injunction, but permitting maintenance of the toll line, was proper as against the claim of estoppel. *Idem.*

**Public improvement: Exercise of power.** A city has statutory power to contract for a public improvement, and in doing so exercises a proprietary or *quasi* private power for its own benefit and that of the inhabitants, as distinguished from its legislative, public and governmental power; and is governed by the same rules in the exercise of such power as govern private individuals or other corporations. *First National Bank of Red Oak v. City of Emmetsburg*, 555.

**Same: Liability of city: Ultra vires: Estoppel: Ratification.** A city having power to contract for a public improvement, irregularities in the exercise of that power will not relieve it from

## MUNICIPAL CORPORATIONS Continued

liability for benefits actually received under the contract: Nor can it escape liability on a plea of *ultra vires*, when the contract has been fully performed and it has received the benefits, but under such circumstances it is estopped, the same as an individual, from retaining the benefits and at the same time denying liability. Furthermore under the evidence in this case there was a ratification of the contracts for sewer construction, and a waiver of the right to object thereto. *Idem*.

**Accord and satisfaction.** A compromise, accord and satisfaction by a city with the holder of assessment certificates issued under a public improvement contract is as binding upon it as though a private individual. *Idem*.

**Public improvement: Resolution of necessity: Publication: Waiver.** The publication of a resolution of necessity for a street improvement is jurisdictional; and failure to publish the same in conformity with the statute renders an assessment therefore invalid, unless property owners affected thereby have waived their right to rely on the objection. *Gilcrest & Co. v. City of Des Moines*, 525.

**Waiver of objections: Estoppel.** Where the petitioners for a street improvement knew that the work was in progress and made no objection thereto, except as to the quality of the work, and in no manner questioned the validity of the procedure under which it was being done, they were estopped from objecting to the jurisdiction of the city to make the improvement after the work was completed. *Idem*.

**Board of public works: Acceptance of improvement.** The acceptance of a public improvement upon its completion by a board of public works, and the approval of a schedule of assessments, could only be done by the board when in session and acting as a board; an approval by the members individually was not authorized by the statute. And where the board consisted of two members, one of whom acting alone approved a tentative schedule of assessment prepared by the engineer, and the other refused to assent thereto, the approval of the schedule by the engineer did not constitute a legal acceptance of the work, even though he had power to cast a deciding vote in case of disagreement of the members of the board. *Idem*.

**Assessments: Objections: Right of property owners to be heard.** The owner of property to be assessed for a public improvement is entitled to make the objection before the city council, that the work has been performed in such defective manner



**MUNICIPAL CORPORATIONS Continued**

that the property ought not to be subjected to the burden of paying for it. And even though the board of public works may have accepted the improvement and made a schedule of assessments, the question of assessment was still open for review by the council upon objection to the validity or correctness of the same, and a denial of the right of property owners to be heard on that question rendered the assessment invalid. *Idem.*

**Invalid assessment: Liability of city.** Where the owners of property are not liable for an assessment for a street improvement, because of some defect in the proceedings which is chargeable to the city, a contractor who has completed the improvement may recover the cost thereof from the city. *Idem.*

**Estoppel: Pleadings.** In proceedings before a city counsel and on appeal to enforce assessments for a public improvement, formal pleadings are not contemplated; and the city may show that property owners who petitioned for the improvement had so far acquiesced in its construction as to estop themselves from objecting to the invalidity of the proceedings, without pleading a waiver or an estoppel. *Idem.*

**Street obstructions: Negligence: Evidence.** A city may authorize the use of areas for admitting light from the street to the basements of abutting buildings, and this authority may be implied from long acquiescence in their use; but a property owner may be liable for negligence in the use of the same, notwithstanding the permission. The evidence in this case, that defendant maintained a two-inch plank covering over the window grating in the walk, on which plaintiff stumbled and was injured, was sufficient to take the question of his negligence in so doing to the jury. *Edwards v. Hasel*, 416.

**Negligence: Evidence.** The property in this case was in the possession of a tenant at the time of plaintiff's injury, and the court instructed that defendant could not be held liable unless it was found that the obstruction was furnished by defendant for use by the lessee, for the purpose and in the manner it was used at the time of the accident. *Held*, that the evidence that defendant furnished the cover for the opening constituting the obstruction was sufficient to take the question of defendant's liability to the jury. *Idem.*

**Street improvement: Change in plan: Assessments: Objections.** Under the statutes relating to special assessments for street

**MUNICIPAL CORPORATIONS Continued**

improvement, the question of whether a variance between the improvement as made and that contemplated by the preliminary proceedings is sufficient to avoid a special assessment, should be raised by objection before the council and upon appeal from its action to the court. The mere fact of such a variance, not affecting the substantial character of the improvement will not deprive the council of jurisdiction to make the assessment. *Cheny v. City of Fort Dodge*, 250.

**Same.** Where a street improvement as made does not materially affect the convenient use of the street by a property owner, or deprive it of substantial value to him, he can not for the first time on appeal raise the objection that the improvement was not as contemplated by the proceedings of the council. *Idem.*

**Same.** Property owners have a right to the use of an abutting street for any proper purpose in connection with their business, and the availability of its improvement for such future use may be considered on the question of whether a special assessment for that purpose exceeds the benefits; but a mere departure from the original plan, not affecting the substantial character of the improvement so as to render the contract under which it was made invalid, will not justify an annulment of the entire assessment. *Idem.*

**Viaducts: Damages.** The construction of a viaduct is not such a change of the street grade as precludes a recovery of damages by abutting property owners on account of the obstruction of access to the property, and of light and air; as the statutes expressly provide for damages caused by such improvements. *Newspaper Union v. City of Des Moines*, 685.

**Damages: Benefits: Statutes.** Under the statutes relating to recovery of damages by abutting owners for injury caused by the construction of a viaduct, as in the condemnation of property for internal improvement, recovery of damages can not be entirely defeated by a showing of prospective benefits, although such benefits may be considered in determining the damages. *Idem.*

**Damages: Obstruction of light and air.** Where the construction of a viaduct shuts out the light and air from abutting property which are essential to the use of the property, that fact may be considered in determining the damages to a leasehold estate. *Idem.*

**Damages: Evidence.** On the assessment of damages to abutting

MUNICIPAL CORPORATIONS Continued to

NEGLECT

property arising from the construction of a viaduct, where it appeared that the city permitted abutting owners to connect their property with the viaduct, refusal to permit a lessee to show that by the terms of his lease he was not permitted to make the changes in the property necessary to make the connection was erroneous. *Idem.*

**Same: Evidence: Conclusion.** In the assessment of damages to abutting property caused by the construction of a viaduct, it was erroneous to receive the evidence of witnesses as to the amount of damages, whose conclusions in that regard rested solely upon investigation of viaducts in another city; similarity of the situation in the two cities not being shown. *Idem.*

**Same: Evidence.** On assessment of damages to leasehold property caused by the construction of a viaduct, permission for the city to show whether the leasehold interest was listed for taxation was erroneous. *Idem.*

**MURDER.** See CRIMINAL LAW.

**NEGLECT.** See PHYSICIANS — MINES AND MINING — MUNICIPAL CORPORATIONS.

**Evidence: Burden of proof.** The burden of proof is upon the plaintiff not only to establish a charge of negligence made against the defendant, but also to show by a preponderance of the evidence that the plaintiff himself was free from negligence contributing to his injury. *Drier v. McDermott, 726.*

**Negligence defined.** Primarily negligence is predicated upon a failure to discharge some private or public duty, and consists in the doing of some act, or the omission to do some act, which a reasonably prudent man would not do, or would not omit to do, under like circumstances. *Idem.*

**Determination of issue.** Ordinarily negligence and contributory negligence are questions of fact for the jury, and sometimes even where the facts upon which the negligence is predicated are not in dispute it is for the jury to say whether the course of conduct charged and proven is in itself negligence; but usually where reasonably honest minds could reach but one conclusion from the proven facts, the question of either negligence or contributory negligence is for determination by the court. *Idem.*

**Same.** Where the negligence of both parties contributes to the injury complained of the courts will not listen to either. *Idem.*

**NEGLIGENCE Continued**

**Pleadings: Limitations.** Although the petition in an action for negligence failed to allege freedom from contributory negligence until the filing of an amendment more than two years later, still the action was not for that reason barred. *Bacon v. Iowa Central Railway Co.*, 493.

**Last clear chance.** Under the evidence in this action the questions of whether the enginemen discovered decedent's peril, as he was about to pass over a crossing, and whether by the exercise of reasonable care they might have stopped the train and avoided the accident, were for the jury. *Idem*.

**Contributory negligence: Voluntary exposure to danger: Evidence.** Where a person knowingly places himself in a dangerous position which he might easily have avoided he assumes all risk incident thereto. In the instant case plaintiff was riding a nervous and difficult horse to handle when excited and frightened, of which he was fully aware, and he knew that she was afraid of automobiles and likely to become unmanageable on the approach of a machine; *Held*, that plaintiff was guilty of contributory negligence as a matter of law in waiting for the approaching automobile to come directly opposite him, without dismounting or signaling the driver of the machine to stop, and was thereby precluded from recovering for injuries caused by the frightened animal. *Drier v. McDermott*, 726.

**Contributory negligence: Evidence: Habits.** Where there were no eyewitnesses to an accident, a general habit of the injured party relative to his claimed negligence at the time of the injury may be shown, as bearing on his exercise of care in that respect. Thus where it was claimed that decedent was asleep in his carriage when injured by collision with an automobile it was competent to show his habit of sleeping when driving. *Scott v. O'Leary*, 222.

**Negligent speed of automobile: Instruction.** An instruction following the language of the statute, that one operating an automobile at an average speed of more than twenty miles per hour is prima facie guilty of negligence, was not erroneous, although the language may be somewhat obscure. *Idem*.

**Same: Operation of automobiles: Care.** The driver of an automobile is bound to know that people are likely to be traveling the highway at all seasons of the year, and all times of day and night, and he has no right to expect a free and unobstructed driveway. *Idem*.

**Automobile accident: Negligent operation: Liability.** The oper-

**NEGLIGENCE Continued**

ation of an automobile at a dangerous rate of speed, in view of a curve in the street, and running the machine directly toward the driver of a horse in such a manner as likely to frighten a reasonably safe horse, and which resulted in the fright of the horse, causing it to jump aside to avoid collision and thus overturn the vehicle and injure the occupant, was actionable negligence, for which the operator of the machine was liable. *Staley v. Forrest*, 188.

**Automobile accident: Contributory negligence: Evidence.** The evidence in this action is reviewed and held to show that plaintiff, the driver of an automobile which collided with a street car, was conclusively negligent in approaching the crossing, and that a verdict should have been directed for defendant. *Underwood v. Oskaloosa Traction and Light Co.*, 352.

**Last clear chance: Submission of issue.** Where an automobile accident was clearly the result of the driver's negligence, and he was in no apparent peril up to the very moment of collision with a street car, when the accident was unavoidable, and there was no evidence that the motorman knew that plaintiff's attention was diverted, there was no basis for submission of the action on the theory of the last clear chance. *Idem*.

**Master and servant: Assumption of risk: Evidence.** In this action for injuries to a coal miner, caused by the fall of slate, the evidence is considered insufficient by a majority of the court to show actionable negligence on the part of defendant, either in failing to furnish plaintiff with a safe place to work, or in failing to warn him of the danger; and also that it is sufficient to show an assumption of the risk; while a minority of the court think it was such as to require submission of these issues. The case is determined, however, on the validity of a prior settlement with plaintiff. *Owens v. Norwood White Coal Co.*, 389.

**Master and servant: Assumption of risk.** An inexperienced employee directed to assist in riveting the steel frame of a building, in doing which he was required to lie on a plank supported by two beams at its ends and was thus suspended about twenty feet above the ground, can not be held as matter of law to have been guilty of contributory negligence, or to have assumed the risk of the plank being moved by blows of the riveters so as to slip off the beams; it not appearing that his attention was called to the fact that the blows might have that effect, or that the plank would slip or was slipping,

## NEGLIGENCE Continued

and when from his position he could not well observe that fact. *Collier v. McClintic-Marshall Construction Co.*, 244.

**Same: Contributory negligence: Instruction.** Where the court clearly instructed that for plaintiff to recover he must prove that he did not contribute to his injuries by his own negligence, the further instructions relative to the defendant's liability, that if its negligence was the proximate cause of or "contributed" to plaintiff's injuries, etc., was not erroneous because of the use of the word "contributed" rather than "caused," and might therefore have led the jury to understand that the plaintiff could recover notwithstanding his own negligence. *Idem.*

**Same: Assumption of risk: Instruction.** An employee must have fully appreciated his danger, or by the exercise of reasonable care should have known the danger, before he can be charged with an assumption of the risks of his employer's negligence; and an instruction on the subject was not erroneous because stating that he must have appreciated the *full extent* of the danger; as full extent means no more than full appreciation. *Idem.*

**Master and servant: Safe place to work.** In this action for injury to the driver of a coal mining car the evidence is held to take the question of defendant's negligence in failing to furnish plaintiff a safe place to work, because of a protrusion from a rib of the entry, to the jury. *Ek v. Phillips Fuel Fuel Co.*, 433.

**Contributory negligence: Assumption of risk: Evidence.** The fact that plaintiff had not seen the protrusion on the rib of the entry, that his position when driving the car and previously passing through the entry in going to and from his work was not favorable to a discovery of it, rendered the questions of his negligence and assumption of the risk for the jury. *Idem.*

**Master and servant: Proximate cause: Evidence.** Where an injury may have been caused in several different ways and one is as probable as the other no recovery can be had. The facts supporting the theory relied upon must be of such a nature, and so related to each other, that no other logical conclusion can fairly and reasonably be drawn from them. In this action the evidence is held sufficient to take the question of whether plaintiff was injured by the falling of sand and dirt upon him from a pilaster near which he was excavating to the jury. *Johnson v. Corn Products Refining Co.*, 420.

## NEGLECTANCE Continued

**Safe place to work: Evidence.** The evidence in this case is held to require submission of the question of defendant's negligence in failing to make the pit in which plaintiff was employed a safe place to work, by properly lighting it and guarding against falling sand and dirt. *Idem.*

**Assumption of risk.** Where plaintiff knew nothing of the danger and proceeded with his work of excavating as directed, which did not apparently undermine the pilaster that crumbled and injured him, he was justified in assuming that the excavation could be done in safety. *Idem.*

**Instructions: Negligence of agent.** An instruction that the negligence of defendant's corporate officers or agents was that of the corporation, and that its foreman was an officer, and any negligence of his was imputable to it, was inaccurate in describing the foreman as an officer, and in making any negligence on his part imputable to the corporation, in the absence of a showing that he was a vice-principal; still it was not prejudicial where the duties resting upon the foreman were those of the master relating to the safety of an employee. *Idem.*

**Sudden emergency.** Where an emergency arises through the negligent act of the injured person he can not recover; as where he neglected to look for an approaching train upon nearing the crossing, until within the zone of danger, when his team was frightened and he was thus prevented from discovering his peril. *Powers v. Iowa Central Ry. Co., 347.*

**Last clear chance.** Where the engineer of a train saw plaintiff approaching the crossing but supposed he would exercise reasonable care and not drive onto the track ahead of the train, but when discovering he did not intend to stop it was too late to prevent the accident, the doctrine of last clear chance has no application. *Idem.*

**Veterinary surgeons: Liability for negligence.** One holding himself out as a competent veterinary surgeon, and as such undertakes to treat an animal, is bound to bring to that service the learning, skill and care exercised by the profession generally in that vicinity, although performing the service without compensation; but if he represented himself as a mere student or undergraduate and not a competent veterinary, and disclosed that fact, consenting to undertake the service only upon urgent request and without compensation, and performed the service honestly and to the best of his ability, he would not be liable for resulting injury to the animal. And even a

## NEGLECT Continued

to

## NEW TRIAL

practicing veterinary, who informs the person employing him that he lacks skill and experience in the particular service he is asked to perform, is not liable on account of his professional incompetence. *Morrison v. Altig*, 265.

**Same: Submission of issues: Prejudice.** Where the defendant's evidence, in an action for negligence in the treatment of a horse, tended to show that he informed plaintiff that he was not a competent veterinary, but was a student and had not completed his course, that he was reluctant to undertake the service but consented to do so only upon request and without compensation, he was entitled to have his theory of the case presented to the jury by proper instruction, and failing to so present it was prejudicial error. *Idem*.

**Same: Instructions: Classifications of negligence.** The classification of negligence as slight, ordinary and gross, in instructions to juries, is wrong in principle and likely to confuse and mislead them. *Idem*.

## NEW TRIAL.

**Argument: Exceptions.** Exception to the closing argument of counsel for the state, when raised for the first time in a motion for new trial, comes too late for consideration on appeal. *State v. Wilson*, 698.

**Same.** It is the duty of counsel for the state and for defendant to confine their argument to matters appearing in the record, and it is the duty of the court by proper discipline to keep them within legitimate bounds; but the closing argument for the state will not be held erroneous even though outside the record, where it was invited by improper argument for defendant. *Idem*.

**Same.** Where a picture of the room in which deceased was killed was offered in evidence, and defendant's counsel claimed in argument that because some of the witnesses did not see defendant's hat in the room that it was not there, the fact that counsel for the state, to meet this argument, contended that the hat was about the color of the floor, and threw it upon the floor of the court room for comparison, was not improper, even though no witness testified to the color of the floor of the house; as the picture of the room and the hat were both before the jury from which they could determine for themselves the correctness of counsel's conclusion. *Idem*.

**Same.** Where defendant's hat was offered in evidence, which



## NEW TRIAL Continued

TO

## PARENT AND CHILD

some of the witnesses testified was in the room where deceased was killed, it was permissible for counsel for the state to argue that certain spots on the hat were blood spots. *Idem.*

**Prejudice.** The denial of a new trial for alleged improper argument will not be disturbed on appeal, unless it appears that the ruling was so prejudicial as to deprive the defendant of a fair trial. *Idem.*

**Misconduct in argument.** The fact that counsel for plaintiff in argument urged the jury to award the most liberal verdict permissible under the prayer of the petition, leaving its possibly excessive character to the court and counsel, and also in suggesting the inference that he had a personal interest in a large verdict and that some party other than the defendant might be liable therefor, such for instance as an insurance company, was not such prejudicial conduct as to require reversal, where the court admonished counsel during his argument to keep within the evidence, which admonition was heeded, and in his instructions expressly cautioned the jury against accepting counsel's interpretation of the evidence and that they had nothing to do with his personal interest in plaintiff's case. *Kennis v. Ogden Coal Co.*, 594.

**NUISANCE.** See INJUNCTION — INTOXICATING LIQUORS.

**PAYMENT.** See ACCORD AND SATISFACTION.

**PARENT AND CHILD.**

**Illegitimate relationship: Evidence.** In this action to establish plaintiff's alleged rights as an illegitimate son and heir to decedent's estate, the evidence is reviewed and held to show that plaintiff was the son of decedent. *Tout v. Woodin*, 518.

**Recognition: Evidence.** The recognition by a putative father of his illegitimate child, to be such as to entitle the child to inherit, must be general and notorious; but it need not have been universal or made known to all, or to a majority of the community. It is sufficient if the father frankly admitted the relationship whenever there was occasion for him to speak, and made no effort to conceal the same, even though many of his friends and acquaintances had no knowledge of such recognition. Evidence held to show recognition. *Idem.*

**Paternity: Evidence.** Statements of the mother of an illegitimate child, made at the time of its birth and repeatedly thereafter, that decedent was the father of her child, were admissible as tending to show its paternity. *Idem.*

PARTIES

TO

PHYSICIANS

**PARTIES.** See CORPORATIONS — MARRIAGE AND DIVORCE.

**Waiver of defect.** It is probably not necessary for the wife to join with the husband as a party plaintiff in an action for deceit in the sale of land, but any irregularity in this respect is waived by failure to raise the question by demurrer. *Lenoch v. Yoss*, 314.

**PHYSICIANS.**

**License: Recording.** A physician who has procured a license to practice and has had it recorded in the county of his residence, is entitled to practice in any county of the state without any further record of the certificate, unless he changes his residence, or is an itinerant physician. *State v. Zechman*, 158.

**Indictment: Surplusage.** Where an indictment charged a physician with practicing medicine without having procured a license, the additional charge of failing to have the same recorded was mere surplusage; and instructions on the subject of recording the license were not prejudicial. *Idem*.

**Practice of medicine: License: Instructions.** Where it appeared on a prosecution for practicing medicine without a license that defendants professed to be members of a certain school, maintained an office and held themselves out to treat patients for disease, and did so without having a license from the board of medical examiners, they were guilty of violating the statute requiring a license, in so far as they devoted themselves to and employed means for healing the sick; and they were not prejudiced by instructions to the effect that they might be convicted if without license they publicly professed to cure and heal, or devoted themselves to and employed means to cure, heal and alleviate pain, although the statute does not specifically refer to such acts. *Idem*.

**Same: Application of statute.** The statute requiring a license to practice medicine applies equally to physicians who hold themselves out as such and publicly profess to cure and heal, as to those who make a practice of prescribing for the sick. *Idem*.

**Malpractice: Instructions: Damages.** In an action for malpractice the instruction that plaintiff had the burden of proving by a preponderance of the evidence that the defendant did not treat plaintiff with medical skill and care, that such failure to exercise reasonable and ordinary skill resulted in the injury complained of, that the injury complained of was due solely to

## PHYSICIANS Continued

TO

## PRACTICE

the lack of ordinary skill and care, and that plaintiff was not guilty of contributory negligence, was not objectionable as authorizing recovery without proof of damages. *Haradon v. Sloan*, 608.

**Measure of skill.** The skill required of a physician or surgeon is that ordinarily exercised by the profession as a whole, and not that exercised by those of a particular locality. But in the instant case there was no evidence to show that the skill of physicians in the community was greater than that exercised by those of similar communities, and the instruction fixing the measure of skill by that exercised in the same community or neighborhood was not prejudicial. *Idem*.

**Contributory negligence: Instructions.** Where there was no evidence whatever to authorize a finding that plaintiff in an action for malpractice was negligent, an instruction authorizing recovery if defendant did not use ordinary skill, though ignoring the question of contributory negligence, while incorrect was not prejudicial and did not require a reversal of the case. *Idem*.

**PLEADINGS.** See ATTACHMENT — MARRIAGE AND DIVORCE — MUNICIPAL CORPORATIONS — SLANDER AND LIBEL.

**Demurrer.** Matters of defense need not be negatived in the petition; and if there be a cause of action stated against any of the defendants the petition is not subject to demurrer. *Reed v. Hollingsworth*, 94.

**PRACTICE OF MEDICINE.** See PHYSICIANS.

**PRACTICE.**

**Assignment of cause not at issue.** While there is no statute expressly providing that cases shall not be peremptorily assigned for trial before issue has been joined, such is the fair inference to be drawn from the statutes providing for the filing of trial notices and the assignment of trial causes. *Barber Asphalt Co. v. Standard Fire Ins. Co.*, 90.

**Same: Dismissal of action: Reinstatement.** Where a cause was assigned for trial by the court before issue had been joined and dismissed for want of prosecution, the plaintiff, under the record in this case, was entitled to have the dismissal set aside and the cause reinstated on motion at the same term, and he was not confined to the usual motion for a continuance. *Idem*.

PRINCIPAL AND AGENT

TO

PUBLIC LANDS

**PRINCIPAL AND AGENT.** See AGENCY.**PUBLIC BUILDINGS.** See MECHANICS' LIENS.**PUBLIC HEALTH.**

**Contagious disease: Recovery for supplies: Statute.** The statute providing that a written order from the local board of health, designating the person employed to furnish supplies or services to anyone afflicted with a contagious disease, shall be issued before the services or supplies are furnished and shall be attached to the bill when presented for payment is mandatory, a failure to procure which will defeat recovery. *Ruan v. Mahaska County*, 48.

**Same: Certification of bill for supplies.** The signing of their names by the township trustees on the back of a bill for services or supplies, furnished a person afflicted with a contagious disease, is not a certification of the same to the board of supervisors as is required by statute. *Idem*.

**PUBLIC LANDS.**

**Decisions of interior department: Conclusiveness.** The state courts are bound by a final decision of the Interior Department that lands are in fact swamp and subject to selection under the swamp land Act. *Hart v. Delphav* 216

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PUBLIC LANDS Continued

TO

RAILROADS

from the county conveying swamp land, made after the patent issued to the county, is not estopped from challenging the validity of a tax deed under a sale made when the land was not subject to taxation, by reason of the fact that her husband had made an invalid homestead entry upon the land. Besides the estoppel pleaded was of no avail because the plaintiff must recover, if at all, upon the strength of his own title. *Idem.*

**Tax title to swamp land: Proof.** The holder of a tax title to swamp lands can not rely thereon, in the absence of a showing that during the years for which the lands were taxed the state and county had parted with their title, or were estopped from claiming title thereto. In the instant case the evidence shows that the county had parted with its title to one of the lots in question, but not to the others, when the sales under which plaintiff claims were made. *Idem.*

**Estoppel.** Where the county sold and retained the purchase price of swamp land, and thereafter listed and assessed the same for taxes, it was estopped from claiming that the land was not sold and not subject to taxation, as against the holder of the tax title; and the county's grantee was subject to the same estoppel. *Idem.*

**Same.** Where the county made executory contracts for the sale of swamp land which were never performed, and the deposits made thereon were kept intact and finally refunded, but the county levied assessments and sold the land at tax sale, it was not thereby estopped to deny that it had parted with its title or that it was subject to taxation. *Idem.*

**RAILROADS.**

**Crossing accident: Contributory negligence: Evidence.** Where the evidence in an action for a railroad crossing accident conclusively established the fact that had plaintiff looked when nearing the track he could have seen the approaching train and avoided the injury, his testimony that he did so look presented no such conflict in the evidence as to require submission of that issue. *Powers v. Iowa Central Ry. Co., 347.*

**Same.** One driving upon a railroad crossing knowing that a train was due about that time, without looking to see if it was approaching, was guilty of contributory negligence as matter of law. *Idem.*

**Injury to passenger: Settlement: Mental capacity: Evidence.** In

**RAILROADS Continued**

this action for injury to plaintiff while a passenger on defendant's train, the evidence is reviewed and held insufficient to show that plaintiff was mentally incompetent when he made a settlement for his injuries, but rather that he fully comprehended and appreciated his acts in accepting a check in settlement and in his use and disposition of the proceeds of the check. *Oakes v. Chicago, Burlington & Quincy Railroad Co.*, 15.

**Unauthorized act of employee: Liability.** The act of a railway employee, with whom the custody of torpedoes to be used in the giving of signals and operation of trains was entrusted, in attaching a personal note to a friend to one of the torpedoes and throwing it from the train as a means of delivering the message, was not within the scope of his employment; and the company was not liable to the party receiving the communication for an injury received from the subsequent explosion of the torpedo. *Johnson v. Railway*, 738.

**Street railways: Negligence: Last clear chance: Instructions.** Where the court clearly instructed that it was the duty of the motorman to stop his car to avoid injury to decedent after discovering his peril, failure to refer to the duty of the motorman to "slow down" the car, as requested by plaintiff, was not erroneous; as the duty to reduce the speed is included in the requirement to bring the car to a stop. *Hoffman v. Railway Co.*, 655.

**Degree of care: Instructions.** Where the court correctly instructed that it is the duty of a street railway company to use the highest care and foresight for the safety of passengers consistent with the practical operation of its cars, the further instruction that it is the duty of the motorman at all times to use reasonable care to prevent injury to all persons using the street, as well as passengers upon his car, was not erroneous, as tending to lead the jury to think that he was only required to use reasonable care for the safety of passengers. *Idem.*

**Custom: Instruction.** Where there was no evidence of a custom or usage to enter a street car at the front left-hand door, so that a person on the step would be in danger of being carried by a moving car against a trolley post, the refusal of an instruction that plaintiff's decedent had the right to assume, in the absence of knowledge to the contrary, that defendant had so constructed its tracks as not to expose a person to danger in so entering the car, was proper. *Idem.*

RAILROADS Continued

TO

REAL PROPERTY

**Negligence: Warning: Instruction.** In the absence of any showing that the motorman knew or should have known that decedent was attempting to enter the car at the front left-hand door, refusal of an instruction that after he became aware of deceased's intention to thus enter the car, thereby placing himself in peril, it was the duty of the motorman to warn him not to do so, was proper. *Idem.*

**Last clear chance: Instructions.** Where the jury was told that contributory negligence of deceased would bar recovery, the further instruction in explanation of the rule of the last clear chance, that if, after becoming aware of the peril of deceased, the motorman negligently failed to use the highest degree of care to avoid injury to him defendant would be liable, was not misleading. *Idem.*

**Passengers: Instruction.** Where the court gave a proper instruction regarding the care required of a carrier for the safety of its passengers, failure to define who is a passenger was not erroneous, in the absence of a request for such an instruction. *Idem.*

**Same: Company rules: Violation: Negligence: Evidence.** The rules adopted by a railway company for the regulation of the conduct of its employees are not admissible in an action for the death of a third person, not charged with knowledge of such rules and not having acted in reliance thereon, for the purpose of showing that the company was liable for negligence on account of a violation of such rules. *Idem.*

**RAPE.** See CRIMINAL LAW.

**REAL PROPERTY.** See CONVEYANCES — PUBLIC LANDS.

**Boundaries: Known monuments: Field notes: Conflict.** The actual survey upon the ground, as ascertained by monuments then made to mark the boundaries of lots and blocks, will control over the paper plat and field notes of the survey. Thus where stakes were set in making the original survey of a tract, to mark the lots, blocks and streets, and were subsequently ascertainable and were recognized by lot owners in building, and by the public in the improvement of the abutting street, the stakes thus set were controlling over a subsequent survey made from the original field notes, but which did not correspond with the original markings. *Tomlinson v. Golden*, 237.

**Construction: Sale of real property: Payment of assessments.** The parties to this action entered into a contract for the sale

## REAL PROPERTY Continued

TO

## SCHOOLS

of land which provided for final payment of the purchase price on a certain date, that defendant should then show good title, and further that the purchaser should pay all taxes and assessments as they became due. The abstract disclosed an assessment for drainage purposes at the date of the contract in a certain sum, and a supplemental contract was made authorizing plaintiff to retain from the final payment of the land a sum equal to the assessment. After the date for final payment further drainage proceedings were had resulting in a much larger assessment against the land. *Held*, that the contract should be construed as applying to the date of final payment for the land and not as embracing subsequent assessments, and that plaintiff was not entitled to recover the difference from defendant on the theory of mistake. *Scott v. Wilson*, 31.

**Easements: Common stairway.** Where the owner of adjoining lots constructed buildings thereon, and practically on the division line of the lots built a single stairway to the second story for the accommodation of both buildings, which was essential to both and constantly used by the occupants of the buildings for a long series of years, a conveyance of the lots to separate grantees carried with it an easement or the right of each purchaser to use the common stairway. And in an action for the enforcement of that right it was necessary for the plaintiff to show a way of necessity. *Stephens v. Boyd*, 570.

**Same: Estoppel.** Although plaintiff may have unadvisedly admitted that he had no conveyance of the adjoining lots, still as the admission was in no manner acted upon by defendant, and plaintiff very soon thereafter sought legal advice, and upon learning his rights instituted suit to restrain defendant from removing the stairway, he was not estopped by the admission to claim the right to use the easement; nor was the same conclusive against him on the merits of the case. *Idem*.

**RECEIVERS.** See CORPORATIONS.

**REMOVAL OF CAUSES.** See ACTIONS.

**SEDUCTION.** See CRIMINAL LAW.

**SETTLEMENT AND RELEASE.** See FRAUD.

**SCHOOLS.**

**Notice of board meetings: Sufficiency of notice.** The statute providing that a special meeting of the board of school directors may be called upon notice of the time and place,



SCHOOLS Continued

TO

SLANDER AND LIBEL

delivered to each member in person, does not contemplate the mailing of notice to the members; and an attempt to serve notice by mail which does not reach the member to be notified is insufficient, notwithstanding the good faith of the secretary of the board in attempting to give the notice; and the proceedings of the board in the absence of a member to whom legal notice of the meeting was not given are invalid. *Barclay v. School Township of Wapsinonoc*, 181.

**Same: Sale of school property: Power of electors: Injunction.**

The statutes expressly confer upon the electors of a school corporation, at the annual or a special meeting duly called for that purpose, power to direct the sale or other disposal of any school house or site, or other property belonging to the corporation; and a court of equity will only interfere with an exercise of this power, when the question, properly submitted, presents a clear ground of equitable relief. The mere fact that a school house had been built but never used for any purpose does not create in the taxpayer a vested right therein which will prevent a sale by the electors. *Idem*.

**SIDEWALKS.** See MUNICIPAL CORPORATIONS.

**SLANDER AND LIBEL.**

**Slander per se: Sense in which words were used: Evidence.** In this action for slander the question of whether the words, slanderous *per se*, were used in a slanderous sense or only in a vituperative sense and were so understood by the hearers was for the jury. *Andreas v. Hinson*, 43.

**Same: Presumption.** The presumption is that language slanderous *per se* was used and understood by the hearers in its ordinary sense, and the burden is upon the defendant to show that it was used and understood in a different sense; and in passing on this question the whole evidence must be considered: So that any error in refusing to direct a verdict for defendant at the close of plaintiff's evidence is not available to defendant, where he subsequently offered evidence curing the defects in plaintiff's case. *Idem*.

**Same.** Malice is implied from the use of words slanderous *per se*. *Idem*.

**Same: Damages: Excessive verdict.** Where the words used were actionable *per se*, actual damages may be awarded without formal proof of the amount; and where the amount of the

**SLANDER AND LIBEL. Continue**

verdict did not ind  
disturbed. *Idem.*

**Evidence: Malice:** I  
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disease, with which  
*Idem.*

SLANDER AND LIBEL Continued

TO

STREETS

**Mitigation of damages: Evidence.** Where there was evidence that defendant knew of the falsity of rumors to the effect that plaintiff was afflicted with an incurable disease, prior to the time he made a like charge, and he made no claim that he merely repeated such rumors, and there was no evidence that he did so without malice and believing them to be true, evidence that certain persons had stated that plaintiff was so afflicted was not admissible in mitigation of damages. *Idem.*

**Same.** The defendant in a slander action can only show in mitigation such rumors as were in circulation before his statements were made; under no circumstances can he show subsequent rumors. *Idem.*

**Mitigation: Instruction.** Where the defendant made no request for an instruction on the subject of mitigation, and made a complaint that one was not given by the court, the matter will not be considered on appeal. *Idem.*

**Damages: Instructions.** The defendant in an action for slander can not be held liable for a repetition by others of slanderous statements made by him, unless he made them with the intention and expectation that they would be repeated, or under such circumstances that it would be likely that the hearer would repeat the same in the course of duty; and an instruction permitting the jury to consider a repetition of his slanderous statements as bearing on the question of plaintiff's damage, unless made under such circumstances, is erroneous. *Idem.*

**Same.** The defendant's pecuniary circumstances and standing in society are matters which may be considered in determining the damages which plaintiff in a slander action ought to recover. *Idem.*

**SPECIAL ASSESSMENTS.** See DRAINAGE.

**SPECIAL INTERROGATORIES.** See APPEAL.

**SPECIFIC PERFORMANCE.** See EQUITY.

**STATUTES.** See CORPORATIONS — DRAINAGE — FENCES — MECHANICS' LIENS — MUNICIPAL CORPORATIONS — PUBLIC HEALTH — TELEGRAPH AND TELEPHONES.

**STREETS.** See CORPORATIONS.

TAXATION

TO

TELEGRAPHS AND TELEPHONES

**TAXATION.** See PUBLIC LANDS.

**Assessment of property: Equality.** An assessment of property must be fair and equitable, as compared with the valuation and assessment of other like property in the same jurisdiction, so that no particular piece of property will be made to bear an unjust proportion of the public burden. This rule is not modified by chapter 60 of the Acts of the Thirty-Second General Assembly relating to appeals. *Reiniger v. Board of Review of City of Charles City*, 193.

**Caveat emptor.** The doctrine of *caveat emptor* applies to purchasers at a tax sale, and they therefore take no interest in lands not subject to taxation. *Hart v. Delphey*, 316.

**TELEGRAPHS AND TELEPHONES.** See MUNICIPAL CORPORATIONS.

**Telephone associations: Membership: Transfer of same.** In this action by a mutual telephone company to enjoin defendants from connecting with or using its lines, it appears that the articles of the telephone association provide for a membership fee which entitled the member to one phone, and that they prohibit the sale of the membership right without first offering it to the association, except that a purchaser of the farm may have the first right to purchase the seller's telephone rights. *Held*, that a warranty deed of the farm, with all appurtenances thereto belonging, did not operate to pass the vendor's membership in the association to the purchaser, and that the association is entitled to enjoin the purchaser from connecting with and using the line. *Cantril Telephone Co. v. Fisher*, 203.

**Telephones: Statutes: Franchise: Conditions precedent.** Code, section 2158, authorizing the construction of telegraph and telephone lines along public roads must be construed with reference to other provisions of the statutes on the same subject, and not as granting the absolute and unconditional right to occupy the streets and alleys of a municipality without its consent first obtained, as provided by sections 775, 776; for the power therein granted to cities and towns is not merely to regulate, but is to authorize or prohibit, and the procuring of a franchise from the municipality and its ratification by the electors are conditions precedent to the right to occupy its streets with a telephone system. *Farmers Telephone Co. v. Town of Washta*, 447.

TENANCY

TO

. TRUSTS

**TENANCY.** See CORPORATIONS.

**Co-tenants: Ouster: Adverse possession.** Ordinarily a tenant in common can not hold adversely to his co-tenant, or a life tenant to the remaindermen; but this rule only applies where the relationship is continuous. So that where a life tenant foreclosed a mortgage which she held upon the property and acquired a sheriff's deed, the remaindermen having knowledge of the proceedings, and thereafter claimed to hold the property under color of the sheriff's deed, there was a sufficient ouster to set the statute of limitations in motion. *Mitchell v. Vest*, 336.

**TRUSTS.** See WILLS.

**Equitable conversion.** A conveyance of property in trust for specified purposes with no imperative direction that the trustees shall sell the same, though containing simple authority to sell, will not effect an equitable conversion of the real property into personalty. *Swisher v. Swisher*, 55.

**Trust deeds: Grantee as beneficiary: Effect.** A person can not hold the legal title to real property in trust for his own benefit: So that a trust deed naming one of the grantees as a beneficiary vests in him the entire title to his undivided interest or share in the property. *Idem*.

**Evidence.** The heirs to the estate of their deceased father, who conveyed their interests to their mother, since deceased, for the purpose of facilitating a settlement of the estate, are incompetent witnesses for the purpose of establishing a trust in the mother, pursuant to an alleged agreement on her part to pay the debts of the estate and hold the balance for their benefit; and such a trust can only be established by clear and satisfactory evidence. Inadequacy of consideration for the conveyances is not ground for setting them aside or declaring a trust. *Burch v. Nicholson*, 502.

**Same.** An express trust in land can not be established by parol proof; it must be in writing duly signed and acknowledged in conformity with the statute. *Idem*.

**Evidence: Limitations.** Where the evidence disclosed that a son was to use and handle personal property of his deceased father as his own, with no requirement for an accounting to anyone, finally using and disposing of it all, and his mother made no claim to any interest therein for more than ten years

TRUSTS Continued

TO

WILLS

thereafter, no trust in favor of the mother was established: and if a trust existed action therefor was barred. *Parmenter v. Parmenter*, 195.

**VETERINARY SURGEONS.** See NEGLIGENCE.

**VIADUCTS.** See MUNICIPAL CORPORATIONS.

**WAIVER.** See APPEAL — INFANTS — MUNICIPAL CORPORATIONS.

**WATERS.** See DRAINAGE — INJUNCTION.

**WILLS.** See CORPORATIONS.

**Construction: Life estate.** In the construction of wills, courts will look to the intent of the testator as gathered from the instrument as a whole, rather than to a comparison of particular words and phrases with those of like import used by others under other surroundings; the ordinary canons of construction are to be followed simply as aids in determining the testator's intent.

Where the testator gave his wife a life estate and upon her death his son to become the owner of a life estate, and upon his death the property to go to the heirs of his body, and if he died without issue then to his sisters, and limited his power of alienation except for the purpose of paying legacies, the son took only a life estate; the rule of *Shelley's case* not being controlling. *Williams v. Williams*, 621.

**Construction: Life estates.** In the construction of a will the court will give effect as far as possible to every part of the instrument for the purpose of carrying out the evident intent of the testator. By one paragraph of the will in the instant case the testator gave his wife all his property of which he might die seised, and provided in subsequent paragraphs that after her death certain children should receive legacies, the residue to be divided equally between his children. *Held*, that the wife took only a life estate. *Boekemier v. Boekemier*, 372.

**Construction: Who included as devisees.** A will bequeathing the life use of real property, and providing that upon the death of the life tenant the property should go to his children then living and the issue of any child of the life tenant then deceased, did not contemplate children of the life tenant living at the time of the testator's death, but excluded those living at testator's death who did not survive the life tenant. *Birdsall v. Birdsall*, 363.

## WILLS Continued

**Remainders: Acquisition of life estate: Effect.** Under the provisions of the will in this case the interest of the remaindermen was not vested during the life of the life tenant but was contingent, not only as to the extent of the share to be enjoyed by those who survive the life tenant but also as to the persons who are to take shares in the remainder: So that the remaindermen can not, by acquiring the existing life estate, perfect a complete title in themselves. *Idem.*

**Construction: Trust estate.** A will devising all of testator's property to his widow, to be used by her in the best manner for the benefit of his children, upon her death the remaining part to be equally divided among his children, and empowering her to do with the property whatever might be for their common interest, created a trust estate for the benefit of the children, with no power of disposition in the widow except in execution of the trust, and her interest in the estate ceased at her death. *Van Pappelendam, Adm'r. v. Thomas, 358.*

**Same.** No particular form of words is necessary to the creation of a trust estate; the fundamental question being the intent of the testator. *Idem.*

**Same: Distributive share: Pleadings.** The heirs of a widow provided for by the will of her husband can not insist on her having a distributive share in the estate, in the absence of pleading and proof that she did not elect to take under the will. *Idem.*

**Same: Rights of widow: Distributive share.** Under the Code of 1860, providing that the widow's dower could not be affected by the provisions of her husband's will if she relinquished her rights under the will, an entire failure to make any objection to a provision for her benefit amounted to an election to accept its terms, and her heirs could not rely on her having a distributive share in the estate. *Idem.*

**Construction: Estate for life.** A devise of real and personal property to the wife while she remained testator's widow was in effect a devise to the widow for life or during her widowhood, and conferred upon her no estate of inheritance. And a further provision that she should take charge of everything and use it to the best of her knowledge and ability, without bond or security, did not have the effect to render the estate one in fee simple. *Brunk v. Brunk, Adm'r., 51.*

**Same.** The subsequent provisions of the will devising a life estate to the widow, that in case she should remarry she should

**WILLS Continued**

have one-third of the property and the balance should be divided among certain children, she to have the use of the estate prior to remarriage, did not give her an absolute power of sale but simply the right to take and use the property, which was consistent with the life estate granted, and did not convert it into a fee simple on the theory that there may not have been any property left at her remarriage to be divided. *Idem.*

**Costs: Apportionment.** Parties unsuccessfully resisting an application to set aside the sale of an administrator and for his removal, can not complain of an apportionment of the costs and the taxation of a portion against them. *Idem.*

**Election by widow.** A will bequeathing one-half of all testator's estate to his widow in fee and the other half to her for life, with the provision that whatever remained at her death of the one-half given her for life should go to the heirs of the testator, gave the wife a life estate in the remaining one-half and left nothing from which she could take a distributive share; and she was required to elect whether she would take under the will or the statute. *Mitchell v. Vest*, 336.

**Same.** The final report of the widow as executrix under the will of her husband, giving her one-half the estate in fee and the other half for life, which showed the probate of the will, full settlement of the estate, and that she was in possession of all the property, was a sufficient election to take under the will. *Idem.*

**Heirs: Nonresident aliens.** Nonresident aliens can not acquire real property under a will devising the same to the legal heirs of the testator; as the legal heir of another must have inheritable blood, and the statutes of this state prohibit such aliens from taking the property of testator, either by descent or devise. *Idem.*

**Remainder: When vested.** A will bequeathing a life estate to the widow and whatever may remain to the legal heirs of the testator, vests the remainder in those heirs qualified to take the property at the time of the testator's death; it is only the enjoyment that is postponed. *Idem.*

**Election: Satisfaction of debt to legatee.** Under a will giving the widow one-half the property in fee and the remainder for life, the interest under the will being less in value than the amount of a valid mortgage held by her on the property, she was not put to an election; and as the will provided for the



**WILLS Continued**

payment of all just debts, the doctrine of satisfaction of the mortgage has no application, as that question arises only where the legacy is equal to or greater than the debt. *Idem.*

**Devise to widow: Election.** A devise to a widow is in the nature of an offer by the testator in lieu of her distributive share under the statute, and is not effectual until she has elected to accept the devise. *Arnold v. Livingston, 677.*

**Time for making election.** The statute relating to an election by a widow to accept the provisions of her husband's will made for her benefit fixes no time limit for service of notice upon her by those interested in the estate; and in the absence of such notice she need not make her election within any particular time or in any particular manner. *Idem.*

**Manner of election: Evidence.** Under the present statute a widow's election to take under her husband's will may be made at any time, and may be shown by express words of election, or in any other manner in which the intent to elect can be ascertained. Evidence held to show an election to take under the will rather than under the statute. *Idem.*

**Effect of election.** A widow's election to take under her husband's will is binding upon her devisees. *Idem.*

**Life estate in earnings.** A will bequeathing a life estate in the income of corporate stock means a bequest of the earnings of the stock; the term income having the same significance as the term dividend. *Lauman v. Foster, 275.*



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